Supreme Court, U.S.
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No. 04- ____

In the Supreme Court of the United States

PETER M. HAGAN,

Petitioner,

v.

WARNER/ELEKTRA/ATLANTIC CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. What are the appropriate standards lower courts should follow in determining whether a private sector employer has followed its voluntary affirmative action plan and subsequent enabling race-conscious remedial measures in making an adverse employment decision to the detriment of a majority employee?

2. What are the appropriate standards lower courts should follow in determining whether a voluntary affirmative action plan upon which a private sector employer relies to institute race-conscious hiring and promotion measures to the detriment of a majority employee is valid?

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

The parties to the proceeding are set forth in the case caption. Petitioner has no corporate affiliations.

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OPINIONS BELOW

The decision of the United States Court of Appeals for the Sixth Circuit, dated May 28, 2004, denying Petitioner's Petition for Rehearing and Rehearing *En Banc* is reprinted at App. 1a. The unpublished March 10, 2004, Sixth Circuit panel opinion is reprinted at App. 2a -12a. The April 24, 2002 order of the United States District Court for the Southern District of Ohio, Western Division, is reprinted at App. 13a-43a.

STATEMENT OF JURISDICTION

The Sixth Circuit issued its decision denying Petitioner's Petition for Rehearing and Rehearing *En Banc* on May 28, 2004. This petition for certiorari is timely in that Petitioner has filed it within 90 days of May 28, 2004. This Court has jurisdiction pursuant to 28 U.S.C. Sec. 1254(l).

STATUTORY PROVISIONS INVOLVED

This case involves the interpretation and application of Title VII of the Civil Rights Act of 1964 ("Title VII"), 29 U.S.C. Sec. 2000e et seq. Specifically, 42 U.S.C. Sec 2000e-2(a)(1) is the relevant statute involved in this Petition.

42 U.S.C. Sec. 2000e-2(a)(1) provides:

(a) Employer practices

It shall be an unlawful employment practice for an Employer--

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any

> individual with respect to his compensation terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin[.]

STATEMENT OF THE CASE

I. Overview of the Case

The United States District Court for the Southern District of Ohio ("The District Court") granted Respondent's Motion for Summary Judgment. It held that Petitioner did not adduce direct evidence of reverse discrimination, noting that the existence of Respondent's affirmative action plan, coupled with other evidence that Respondent was engaging in other race-conscious efforts to increase minority representation in the workforce, did not constitute direct evidence of race discrimination. App. 37a-39a.

The Sixth Circuit panel affirmed the District Court's granting of summary judgment. It held that the existence of a valid affirmative action plan is irrelevant to the issue of direct evidence of reverse discrimination, and found that Respondent's mere denial that it acted according to the Plan was sufficient to overcome the import of company pronouncements that it intended to, and did, embark in proactive race-conscious hiring and promotion programs.

The Sixth Circuit denied Petitioners Petition for Rehearing and Rehearing *En Banc*, without giving any reasoning in support for its denial. App.1a.

II. Background of the Case

Petitioner Peter Hagan ("Hagan") was hired by Respondent Warner/Elektra/Atlantic Corp. ("WEA") as a sales representative in 1974. App.15a. Over the years, Hagan advanced steadily through the ranks until he was promoted to the position of Sales Manager of WEA's Cleveland, Ohio office in 1992. App. 15a. In 1995, WEA underwent a corporate reorganization, wherein WEA promoted a much younger and inexperienced African American employee Dale Hill ("Hill") to take over Hagan's job, and demoted Hagan to the subordinate role of Field Sales Manager whereby he would now report directly to Hill. App. 47a-48a. This was accomplished notwithstanding the fact that Hagan had performed very well in his current job, had received recognition for being a very effective sales manager, and had not received any adverse write-ups by his superiors. App. 52a.

In the next few years, Hill performed very poorly at his job. He was criticized for his dishonesty, crude language, harassment of employees, and laziness. App. 53a-54a. In 1999, the Cleveland office was shut down. Hill was offered a transfer to a vacant position in WEA's Philadelphia office, whereas the far more qualified Hagan was not. After Hill turned down the position, it was offered to another lesser qualified and experienced African-American employee, even though Hagan was more qualified for the job. App. 54a-56a. Another Philadelphia vacancy was offered to a similarly less qualified African-American employee instead of to the more qualified Hagan. App. 54a-56a Hagan then quit rather than accept a far lower paying non-management job with far less responsibility. App. 56a.

Prior to the operative events of this case, WEA maintained in place a lengthy Affirmative Action Plan to promote the hiring and promotion of African-American employees into management positions, so as to remedy the historic "under-utilization" (WEA's words) of African Americans in the past. App.46a. WEA's CEO had often gone on record as championing this cause, and favorably cited his concerted and successful efforts over the years to increase the numbers of minority individuals in the ranks of WEA management. App. 46a-47a. WEA's home office in California pressured and exhorted its branch managers throughout the country to track and report back their progress in increasing minority representation in their offices. App. 46a. Hagan's own supervisor in the Cleveland office often reported to WEA's home office his anxiety over his inability to achieve the desired results and his resolve to try harder. App. 46a. WEA and other record companies were also under intense public pressure from Jesse Jackson and the Rainbow Coalition to hire more minority individuals into management. App. 47a.

There has been no showing whatsoever of a court finding, either state or federal, that WEA has ever engaged in race discrimination. Nor has WEA been party to a Consent Decree mandating that it take positive steps to remedy past race discrimination. Nor is there any evidence that WEA in particular, or the recording industry in general, has ever engaged in illegal or invidious discrimination against African American employees or applicants. The Affirmative Action plan promulgated by WEA has no termination date.

III. Proceedings Below

Hagan filed this Title VII case alleging, *inter alia*, reverse race discrimination, both in his being replaced as Sales

Manager in 1995 by the lesser qualified and less experienced minority employee Hill, and later in 1999 in being passed over in favor of Hill and other less qualified and less experienced minority individuals for transfer to vacant management positions in Philadelphia for which he was qualified. Hagan cited to the District Court, and later to the Sixth Circuit, WEA's Affirmative Action Plan and the other subsequent remedial measures *supra* that taken pursuant thereto, as direct evidence of reverse race discrimination.

The District Court, in granting WEA summary judgment, held that the existence of the Affirmative Action Plan, even when coupled with the above-cited other race-conscious remedial actions undertaken by WEA to increase minority representation, did not constitute direct evidence of reverse race discrimination, "particularly where the employer has denied acting pursuant to the plan and there is no direct evidence to the contrary." App. 38a. (emphasis added).[1]

In affirming the District Court, the Sixth Circuit also found no direct evidence of reverse race discrimination. Like the District Court, the Sixth Circuit found the terms of the Affirmative Action Plan and Respondent's other remedial measures irrelevant to the issue of direct evidence of reverse

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[1] The District Court also held that Hagan had failed to make out his case under the "indirect evidence" method, since he had failed to satisfy one of the extra prongs of the modified *McDonnell Douglas* prima facie test, i.e., that there existed background circumstances which would suggest that WEA was that unusual employer who discriminated against the majority. The District court refused to regard the Affirmative Action Plan and its subsequent race-conscious measures as indirect or circumstantial evidence of reverse race discrimination. App. 38a-40a.

race discrimination, absent evidence that WEA acted pursuant to the plan in taking the adverse actions against Hagan. App. 6a.[2]

REASONS FOR GRANTING THE PETITION

Supreme Court Rule 10 sets out the various considerations to be used by this Court in determining whether to grant a petition for a writ of certiorari. One major consideration is whether a "United States court of appeals has entered a

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[2] The Sixth Circuit, like the District Court, also rejected Hagan's attempt to make out his case on the basis of indirect evidence. However, unlike the District Court, the Sixth Circuit assumed for the sake of argument that Hagan met all of the prongs of the prima facie test, App. 7a, but further held that Hagan had failed to produce credible evidence that WEA's articulated reasons for demoting and later failing to transfer him were pretextual. App. 7a-12a. In so doing, the Sixth Circuit failed to regard the Affirmative Action Plan and the subsequent race-conscious remedial measures to constitute even circumstantial evidence of reverse race discrimination. The Sixth Circuit also chose to disregard the sizeable quantum of credible evidence calling into question WEA's nondiscriminatory reasons for taking its adverse actions against Hagan. App.50a-60a. Instead the Sixth Circuit fully credited WEA's version of the facts, in direct contravention of this Court's ruling in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242,247-248 (1986) to the effect that a court must examine *de novo* all of the documentary and testimonial evidence in the record, drawing in the process all inferences from the underlying facts in a light most favorable to the non-moving party. The Sixth Circuit's failure to adhere to this long-established doctrine is fully discussed in Petitioner's Petition for Rehearing and Rehearing *En Banc* which is attached to this Petition as Appendix D.

decision in conflict with the decision of another United States court of appeals on the same important matter. . ." Another consideration is that "...a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court." A third consideration is whether a circuit has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power. All of these considerations are present in this case.

The presence of Affirmative Action Plans ("AAP"s") and other race-conscious remedial measures, taken in conjunction with, or independent of, such AAP's, have become increasingly commonplace as large corporate employers strive to increase diversity in their workplaces and foster upward mobility of minority employees into higher levels of management. While these AAP's and supporting remedial measures are inherently worthwhile, and their aims laudable, federal courts have not given private employers *carte blanche* power to implement them. Rather, they have closely scrutinized such measures, and, on many occasions, have invalidated adverse employment actions taken in pursuit thereof when the result is unlawful discrimination against majority (invariably Caucasian) employees.

The Sixth Circuit concluded that Petitioner had failed in his attempt to establish that Respondent's AAP constituted direct evidence of reverse race discrimination. It noted that Petitioner was unable to demonstrate that Respondent had acted pursuant to its AAP when it took the at-issue adverse employment actions against him. In so doing, the Sixth Circuit refused to consider circumstantial evidence adduced by Petitioner that would tend to establish that Respondent was

so motivated to take these adverse employment actions. However, a number of United States courts of appeal in other circuits have in fact allowed reverse discrimination plaintiffs to use a wide variety of circumstantial evidence to establish the causal connection between an employer's AAP and subsequent adverse employment actions taken against them. There is thus a conflict in the circuits on this important evidentiary question that calls for resolution by this Court.

Secondly, should this Court take up this case based on the above considerations, it will then be squarely faced with the tandem issue of what factors lower courts should consider in determining the validity of AAP's relied upon by private sector employers as justification for undertaking employment measures that favor minority employees to the detriment of majority employees. There is a wide divergence among the circuits as to what these factors should be. This Court should grant Petitioners petition for the purpose of resolving this conflict.

Finally, the Sixth Circuit made a number of critical credibility resolutions and drew a number critical inferences in favor of the Respondent in affirming the District Courts granting of its Motion for Summary Judgement. In so doing, the Sixth Circuit's departure from well established law was sufficiently marked as to call for an exercise of this Court's supervisory power.

This Court's review is warranted for all of these reasons.

I. Review is Warranted Because the Decision of the Sixth Circuit is in Direct Conflict with the Decisions of the United States Court of Appeals in other Circuits as to How a Reverse Discrimination Plaintiff can Prove a Causal Relationship Between an Employer's AAP and its Subsequent Adverse Employment Actions Taken Against Him.

The District Court, conceding the existence of Respondent's AAP and other measures taken in furtherance thereof, refused to regard these undertakings as direct evidence of reverse race discrimination, largely because Respondent denied that it had acted pursuant to the AAP in first demoting and later denying a transfer to Petitioner. App. 38a. The Sixth Circuit, in affirming the District Court, adopted the same rationale. App. 6a. In so holding, it admitted that this was an issue hitherto never addressed in the Sixth Circuit. App. 6a.

However, other Circuits have dealt with the same issue and found that an AAP is evidence of reverse race discrimination. In *Bass v. Board of County Commissioners*, 256 F.3d 1095 (11th Cir. 2001), the Court held that the hiring of minority individuals in pursuit of goals of affirmative action plans, and policy statements made by hiring authorities in support of affirmative action objectives may constitute direct evidence of discrimination, *even if the employer denied having been so animated*, as long as there is other evidence that the employer acted pursuant to the stated AAP. *Id.* at 1110, n.7. *See also McGarry v. Board of County Commissioners of Pitkin*, 175 F.3d 1193, 1200 (10th Cir. 1999), where the court found there to be direct evidence of discrimination in light of the fact that the plaintiff had been passed over for promotion in favor of two minority employees due to their race. In *Brown v. McLean*, 159 F.2d 898, 904

(4th Cir. 1998), the Court held that the existence of an AAP constituted evidence, as long as the employers at-issue adverse actions were taken pursuant to the plan. *Accord Cerrato v. San Francisco Community College District*, 26 F.3d 968, 976 (9th Cir. 1993).

The existence of an AAP has also been found to be relevant in a reverse discrimination plaintiff's attempt to prove his case through indirect, as opposed to direct, evidence of discrimination. Once such a plaintiff has made out his *McDonnell-Douglas* prima facie case, and the employer has met its burden of articulating non-discriminatory business reasons for taking adverse action against him, the plaintiff then has the burden of showing that the employer's decision to take adverse action against him was pretextual. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Texas Dept. Of Community Affairs v. Burdine*, 450 U.S. 248 (1981). A number of Courts of Appeal have looked upon AAP's and their race-conscious enabling measures as relevant to the question of whether a reverse discrimination plaintiff has succeeded in meeting this burden of establishing pretext. *Schurr v. Resorts International Hotel, Inc.*, 196 F.3d 486, 497-98 and n. 11 (3d. Cir. 1999). *Taxman v. Board of Education of the Township of Piscataway*, 91 F.3d 1547, 1556-57 (3d Cir. 1996); *Cunico v. Pueblo School District No. 60*, 917 F.2d 431, 436 (10th Cir. 1990).

The one common thread running through all of these cases is the requirement that the reverse discrimination plaintiff not only prove the existence of the AAP but also that the employer's adverse employment action against the plaintiff was taken pursuant to the AAP. The all-important question thus becomes what sort of evidence must a reverse race discrimination plaintiff adduce in order to demonstrate the causal connection between the AAP and the adverse

employment action? In many cases, such as *Schurr*, *Taxman*, and *Cunico*, *supra*, the question never arises since it is undisputed that the employer took action pursuant to its AAP. The employer even concedes as much. The analysis then proceeds to the next phase wherein the court must determine whether or not the AAP is valid. Far less clear is the question of how a reverse discrimination plaintiff proves this crucial causal connection when the employer claims that it has *not* acted pursuant to its AAP.

The Sixth Circuit in this case pointed to Respondent's denial that it had acted pursuant to its AAP and simply held that Petitioner had failed to establish any evidence establishing the causal connection between the AAP and his demotion and later layoff in lieu of lateral transfer. App. 6a. The Sixth Circuit offered no insight as to how a reverse discrimination plaintiff might establish such a connection. To be sure, Petitioner could offer no *direct* evidence of causation. He could not, and did not, adduce any evidence that the employer stated outright that it had promoted Hill to take the place of Petitioner Hagan in furtherance of its AAP. However, the open question remains as to whether a reverse race discrimination plaintiff like Petitioner might be able to prove causation through indirect or circumstantial evidence. A number of circuit courts have addressed this issue. In *Brown v. McLean supra*, the Court held that the existence of the employer's AAP coupled with the hiring of minorities was by itself insufficient circumstantial evidence to support a finding of a causal connection, at least at the summary judgement stage. *Brown* at 904.[3] *See also McQuillen v. Wisconsin*

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[3] The Court, however, reserved judgment on whether such proof would be sufficient at trial. *Id.*

Educational Association Council, 830 F.2d 659, 666 (7th Cir.1987).

However, other circuits have been more receptive to a reverse race discrimination plaintiff's attempt to prove the existence of causation. In a case remarkably similar to the instant case, *Messer v. Meno*, 130 F.3d 130, 139 (5th Cir. 1997), the Court held that the employer's promulgation of an AAP, coupled with a steady stream of written and oral pronouncements from the employer voicing its support for increased workplace diversity and exhorting its managers to make personnel decisions consistent with this corporate mindset, created an issue of fact as to whether the plaintiff was the victim of reverse discrimination as a result of the AAP. Similarly, in *Bass v. Board of County Commissioners*, *supra* at 1110-1111, the Eleventh Circuit held that a reverse discrimination plaintiff could establish evidence of reverse race discrimination by demonstrating the existence of an AAP, coupled with the same type of circumstantial evidence present in *Messer*, even where the employer has denied acting pursuant to the plan. The same background circumstances relied upon by the courts in *Bass* and *Messer* are present in the instant case.

Another case that is instructive is *Harding v. Gray*, 9 F.3d 150 (D.C. Cir. 1993). *Harding*, albeit, was not faced with the issue of an AAP. The employer had no such plan. However, at issue in *Harding* was how a reverse discrimination plaintiff might establish the existence of reverse discrimination through circumstantial evidence. The *Harding* court relied on the fact that (1) the reverse discrimination plaintiff had not been considered for promotion, (2) management never reviewed the qualifications of the minority employee to determine whether he was more qualified for promotion than a majority candidate, and (3) a

more qualified white applicant was denied promotion in favor of a minority applicant with lesser qualifications. *Id.* at 153-54. All of these facts are present in the instant case. If a plaintiff can make out a case of reverse discrimination based on these circumstances, as Petitioner Hagan has done here, he should, *a fortiori*, be able to do so when, coupled with these facts, he can also show that his employer had in place an AAP and inculcated in its managers an overarching desire to enhance workplace diversity through race-conscious personnel decisions.

In sum, it is self-evident that the decision of the Sixth Circuit, if allowed to stand, will provide little guidance to the lower federal courts as to what standards they should follow in determining how a reverse discrimination plaintiff can meet his burden of showing that his employer took adverse actions against him in furtherance of the goals set out by the employer's AAP. At minimum, the Sixth Circuit's decision in this case is at odds with the decisions of several other circuit courts addressing the same issue.

Therefore, this Court's review is warranted so as to harmonize these decisions and provide guidance to lower courts on the appropriate standards they should follow in making determinations as to how a reverse discrimination plaintiff can prove a causal connection between his employer's AAP and the subsequent adverse actions taken against him.

II. Review is Warranted Because there is a Conflict in the Circuits as to the Standards for Determining the Validity of an Affirmative Action Plan Utilized by a Private Sector Employer to Justify Racial Preferences for Minority Employees.

If a reverse discrimination plaintiff can demonstrate a causal connection between the AAP and his adverse treatment, the case moves to the next stage of analysis, where the validity, or permissibility of the AAP becomes the dispositive issue. If the AAP is valid, it is permissible for a private sector employer to engage in race-conscious personnel measures to increase minority representation in its workforce or management ranks. If, on the other hand, the AAP is deemed invalid, any such race-conscious measures are struck down as unlawful reverse race discrimination.

The Supreme Court first addressed the issues of AAP's in the private sector about 25 years ago in *United Steelworkers v. Weber*, 443 U.S. 193 (1979). The Court ruled that such a plan was permissible where (1) it was intended to remedy a past practice of racial discrimination, (2) the AAP did not "unnecessarily trammel" the interests of white employees by requiring their discharge and replacing them with minority employees and (3) the AAP was a temporary measure. *Id.* at 208. This Court again addressed this issue eight years later in *Johnson v. Transp. Agency, Santa Clara City*, 480 U.S. 616 (1987). In *Johnson*, the Court refined Prong One of the *Weber* test by holding that an AAP is permissible so long as the employer can somehow demonstrate "a manifest imbalance" that reflected an under-representation of protected class members in traditionally segregated job categories. *Id.* at 631. The Court went so far as to say that the "manifest imbalance" need not rise to such a level of a prima facie case

of Title VII discrimination by the employer for the AAP to be found permissible. *Id.*

The task of determining the parameters of what constitutes a "manifest imbalance" or "unnecessarily trammeling" has been taken up by the various circuit courts in the several years after *Weber* and *Johnson*. And the last 17 years has witnessed a significant number of circuit court decisions which have created widely differing, and often conflicting standards for gauging the permissibility of AAP's.

Some courts are more lenient toward employers who offer up their AAP's as a justification for reverse discrimination. In *Setser v. Novack Investment Co.*, 657 F.2d 962 (8th Cir. 1981), the Court was "reluctant to discourage experimentation by employers in remedying past discrimination." *Id.* at 970. If the AAP "has a reasonable purpose and reasonable goals", the Plan is permissible. *Id.* The Court did not, however, offer any guidance as to what constituted "past discrimination". Nor did it define "reasonable". That was left up to the employer, who could interpret these terms as it wished. In *Stock v. Universal Foods Corporation*, 1994 U.S. App. LEXIS 771, 63 Fair Empl. Cases (BNA) 960 (4th Cir. 1994), the Court held that all the employer had to do to establish the permissibility of its AAP was to simply declare that it had historically discriminated against members of a protected class (here women), and that women were underutilized in craft positions. *Id* at *8. The Court also noted the presence of a negative audit by the Equal Employment Opportunity Commission (EEOC). *Id.*

The courts of other circuits have imposed a more onerous burden on employers, and have struck down AAP's that are not tailored to remedy past discrimination, or that unnecessarily trammel the interests of majority employees.

For instance, the Third Circuit, in *Taxman v. Board of Education of the Township of Piscataway*, 91 F.3d 1547 (3d Cir. 1996), struck down an AAP since it was promulgated not to remedy actual prior discriminatory employment practices, but only to promote a more diverse workforce. *Id.* at 1558-1560. Similarly, in *Cunico v. Pueblo School District No. 60*, 917 F.2d 431 (10th Cir. 1990), the Tenth Circuit invalidated the employer's AAP because it was unable to cite any *direct evidence* of past discriminatory conduct. *Id.* at 438. The most the employer was able to demonstrate in *Cunico* was that the AAP helped to increase minority representation in the ranks of management, which had historically been bereft of a significant number of minority individuals. However, the Court noted that this historical under-representation was due more to the lack of minority employees in the work force in general than any prior invidious acts of discrimination by the employer. *Id.* at 438-440.[4] *Taxman* at 1564. *See also Schurr v. Resorts International Hotel*, 196 F.3d 486, 496-98 (3d Cir. 1999). The Court in *Cunico* also noted that the AAP unnecessarily trammeled the interests of majority employees in that the at-issue job slot was earmarked for a minority individual only. *Id.* at 440.

The issue of the permissibility of Respondent's AAP was contested by Petitioner Hagan both in his brief to the District Court in opposition to Respondent's Motions for Summary Judgment, App. 60a-63a, and his appellate brief to the Sixth Circuit, App. 64a-65a. He pointed to the uncontroverted fact that Respondent's AAP was promulgated not to remedy actual prior discriminatory conduct, but rather to remedy a self-perceived "under-utilization" of minority individuals in

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[4] *Cunico* was cited favorably by the Third Circuit in *Taxman*.

the company and to increase diversity within its managerial staff. He also noted that the AAP had no end date. The Sixth Circuit never addressed the issue of the validity of AAP's because, as noted earlier, it had already found, in a very cursory sort of way, no evidence in the record that Respondent's AAP played a role whatsoever in the adverse employment actions it took against Petitioner. This question is, nonetheless, ripe for review by this Court. Petitioner has already argued *supra* why it is important for this Court to review the Sixth Circuit's refusal to find such a causal connection, given the split amongst the circuits as to how such a causal connection may be proven.

Should this Court take the opportunity to clarify the law on this point, it should also take the opportunity to resolve split amongst the circuits as to the companion issue, i.e. the criteria upon which lower courts should rely in deciding the permissibility or impermissibility of AAP's. In fact, this Court has already made a determination to review the question. In *Taxman v. Board of Education of the Township of Piscataway*, 521 U.S. 1117 (1997), granted Petitioner's petition for a writ of certiorari. However, the petition was later denied as moot after the parties to the litigation settled the case. Petitioner Hagan now presents the very same issue for review. Therefore, this Court should, for the same reasons it did in *Taxman*, grant Petitioner's petition for writ of certiorari in this case.

Revisiting the test for balancing the commendable interest of employers who seek to increase the diversity of their workplaces with the equally genuine interest of majority employees in being protected from invidious reverse discrimination is a very crucial, and long overdue, task for this Court. This is especially the case in today's modern environment where thousands of middle-to-large employers

have promulgated AAP's, either for altruistic reasons, or in order to qualify to bid for goods and services contracts with federal, state or local agencies. This Court has not addressed the issue of racial preferences in the private sector since *Weber* and *Johnson* were decided over 17 years ago. The tandem issues of how to establish whether an employer is acting in accordance with its AAP's and how to establish whether or not the AAPs are valid have in the meantime percolated throughout the various circuits. The circuit court decisions have been anything but uniform, thereby depriving countless employers and employees, as well as the attorneys who represent them, of the guidance they need to fulfill their rights and obligations. Therefore, this Court should grant Petitioner's petition for certiorari and review the decision of the Sixth Circuit so as to clarify the law in this area.

III. Review is Warranted Because the Sixth Circuit has so far Departed from the Accepted and Usual Course of Judicial Proceedings as to Call for an Exercise of this Court's Supervisory Power.

Altogether independent of the other grounds under which Petitioner Hagan seeks this Court's review is the method by which the Sixth Circuit accorded weight to the evidence and drew inferences in this case. It has long been well-settled law that at the summary judgment stage of a case, when a United States court of appeals considers whether the non-moving party has established the existence of a genuine issue of material fact, it must examine *de novo* all of the documentary and testimonial evidence in the record, drawing in the process all inferences from the underlying facts in the light most favorable to the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). However, for each opportunity the Sixth Circuit had in this case to address and resolve a material issue of fact, it either altogether

ignored the evidence adduced by plaintiff, or resolved all credibility disputes in favor of Respondent, and further drew all inferences in a light most favorable to Respondent. Petitioner shall not dwell on the each instance where the Sixth Circuit failed to follow the prevailing law, but shall merely direct this Court to Petitioners Petition for Rehearing and Rehearing *En Banc*, which has been included as an appendix to this Petition. App. 44a-59a. Therefore, this Court should except review of the Sixth Circuit's decision so as to exercise its supervisory power, and thereby remand the case to the Sixth Circuit to re-analyze the facts of this case in accordance with the guidelines set forth in *Anderson v. Liberty Lobby, Inc.*

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court grant the Petition.

Respectfully Submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 02-3602

[Filed May 28, 2004]

PETER M. HAGAN,
Plaintiff-Appellant,

v.

WARNER/ELEKTRA/ATLANTIC CORPORATION,
Defendant-Appellee.

On Appeal From
The United States District Court
for the Southern District of Ohio
00-00412, Weber 04-24-02

Before: Nelson, Clay, and Cook, Circuit Judges

ORDER

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote

on the suggestion for rehearing en banc, the petition for rehearing had been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/_____
Leonard Green, Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 02-3602

[Filed March 10, 2004]

PETER M. HAGAN,
Plaintiff-Appellant,

v.

WARNER/ELEKTRA/ATLANTIC CORPORATION,
Defendant-Appellee.

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
00-00412
Weber 04-24-02

Before: NELSON, CLAY, and COOK, Circuit Judges.

OPINION

COOK, Circuit Judge. Peter M. Hagan challenges the district court's grant of summary judgment to his former employer, Warner/Elektra/Atlantic Corporation ("WEA"), on his reverse race, reverse gender, and age discrimination claims. Hagan alleges that discrimination motivated WEA's decision to demote him in 1995 and then to deny him a transfer in 1999. Because Hagan adduced neither direct evidence of discrimination nor evidence that WEA's proffered nondiscriminatory reasons were pretextual. we affirm the district court's judgment.

I

In the early 1990s, Hagan worked as Branch Sales Manager of the Cleveland branch of WEA, a music distribution company. His position ranked second to Branch Manager Richard Froio. In 1995, WEA downgraded the Cleveland office from a branch office to a district office and changed its personnel and management structure. Though Hagan remained second in charge of the Cleveland office, his title changed from Branch Sales Manager to Field Sales Manager. And because Froio left WEA altogether, the top position in the Cleveland office–District Sales Manager–became available.

To fill the District Sales Manager vacancy, WEA hired Dale Hill, an African-American sixteen years younger than Hagan, a Caucasian male, presently fifty-seven years old. Although Hagan now complains about WEA's selection of Hill over him. he served as Field Sales Manager without challenging that management decision until WEA closed its Cleveland office some four years later.

Due to the closing, most employees were not offered an opportunity to transfer to another WEA location and instead lost their jobs. WEA did, however, offer to transfer Hagan. In fact, WEA offered Hagan three options: a sales representative position in another office, a consulting arrangement, or a severance package. Hagan rejected all three options and instead filed suit against WEA, alleging violations of the Age Discrimination in Employment Act. Title VII of the Civil Rights Act, and the Ohio Revised Code. *See* 29 U.S.C. § 621 *et seq.;* 42 U.S.C. § 2000e *et seq.;* O.R.C. §§ 4112.02 and 4112.99.

With his complaint, Hagan charges that unlawful discrimination prompted WEA to "demote" him in 1995. He also claims that impermissible discrimination precipitated WEA's failure to offer him one of three positions in other offices that were available when the Cleveland office closed in 1999. According to Hagan. WEA should have transferred him into a vacant Field Sales Manager position in Philadelphia. WEA instead offered that position first to Hill and then to Jeanne White, an African-American female who, like Hill, was younger than Hagan. Finally, Hagan complains that unlawful discrimination motivated WEA's refusal to offer him the position of Field Sales Manager of Black Music either in Philadelphia or in Detroit. Instead, WEA selected younger African-American women.

Finding that Hagan presented no direct or circumstantial evidence of discrimination, the district court granted WEA summary judgment on all claims.

II

Standard of Review

Summary judgment is proper if we conclude, after reviewing de novo the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits" and drawing all inferences from the underlying facts in the light most favorable to the non-moving party, that "there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48, 255, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).

Direct Evidence of Discrimination

For Hagan to survive summary judgment on his employment discrimination claims, he must have either "presented direct evidence of discrimination or introduced circumstantial evidence that would allow an inference of discriminatory treatment." *Carter v. Univ. of Toledo,* 349 F.3d 269, 272 (6th Cir. 2003) (internal quotation marks and citation omitted). Direct evidence "is that evidence which, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions." *Weberg v. Franks,* 229 F.3d 514, 522 (6th Cir. 2000) (internal quotation marks and citation omitted). If Hagan offers direct evidence of discrimination, the burden shifts to WEA to come forward with evidence showing it would have taken the same actions absent the discriminatory motive. *Id.* (citations omitted).

Hagan does not claim that he can support his age or gender discrimination allegations with direct evidence; rather, he contends that WEA's affirmative action plan and related

documents are direct evidence from which a reasonable jury could infer race discrimination. Although we have found no circuit precedent on point, our sister circuits recognize the existence of an affirmative action plan to be irrelevant to proving discrimination unless the employer acted discriminatorily pursuant to the plan. *See, e.g., Bass v. Bd. of County Comm'rs. Orange County, Fla.*, 256 F.3d 1095, 1110 (11th Cir. 2001) ("The existence of an affirmative action plan, when combined with evidence that the plan was followed in an employment decision, is sufficient to constitute direct evidence of unlawful discrimination unless the plan is valid."); *Cerrato v. San Francisco Cmty. Coll. Dist.*, 26 F.3d 968, 976 (9th Cir. 1994) ("Other circuits have held–and common sense tells us–that the mere fact of an affirmative action plan's existence is not relevant to proving discrimination unless the employer acted pursuant to the plan."). Hagan offers no evidence establishing a causal connection between the plan and his "demotion," but merely argues that a genuine issue of material fact exists because the parties disagree as to the reason for WEA's actions. Hagan's unsupported statement that such evidence exists fails to create a genuine issue of material fact.

We thus agree with the district court's conclusion that Hagan fails to stave off summary judgment with direct evidence of discrimination.

Circumstantial Evidence of Discrimination

Hagan next contends that the district court erred by concluding that he failed to present circumstantial evidence of discrimination. We analyze these claims under the familiar *McDonnell Douglas/Burdine* burden-shifting framework. *Mitchell v. Toledo Hosp.*, 964 F.2d 577, 582 (6th Cir. 1992)

(applying the analysis to claims brought under Title VII, the ADEA, and Ohio law).

1995 Claims

Hagan's claim that he suffered a materially adverse employment action in 1995 upon his "demotion" from Branch Sales Manager to Field Sales Manager–an element of a prima facie case of discrimination–falters because his salary and benefits went unaltered. His proffered evidence shows only a minor change in status and responsibility; he remained second in command of the Cleveland office after its downgrade to a district office. We need not decide whether the district court erred in concluding that Hagan failed to establish a prima facie case of discrimination because even with a prima facie case showing, summary judgment would nevertheless still be appropriate as Hagan cannot rebut WEA's non-discriminatory reasons for "demoting" him.

According to WEA, Schone, the person charged with filling the District Sales Manager position, did not select Hagan to head the Cleveland office because: (1) Hagan did not express real interest in running the Cleveland office; (2) the person in charge of purchasing at Camelot. WEA's largest Cleveland customer (accounting for more than 75% of WEA's business in Cleveland), asked that Hagan not head the Cleveland office; (3) the former head of the Cleveland office. Froio, had worked closely with Hagan and counseled Schone against it; and (4) Schone considered Hagan to be an ineffective leader because of his poor management of subordinates, his inadequacy in dealing with routine personnel issues, and his poor judgment (for example, Hagan dressed as Adolf Hitler at a WEA event and behaved inappropriately while drunk at WEA customer functions).

Hagan argues that the district court should not have considered WEA's fourth reason–Schone's reservations as to Hagan's ability to head the Cleveland office–because it is inadmissible hearsay evidence. Although Hagan correctly argues courts may not consider hearsay evidence on summary judgment, the district court properly considered Schone's testimony because Schone did not offer Hagan's coworkers' observations to prove the truth of the matter asserted, but for their effect on Schone, the listener. *United States v. Horton*, 847 F.2d 313, 324 (6th Cir. 1988).

Our review of WEA's proffered reasons convinces us that WEA satisfied its burden by offering legitimate, plausible reasons for Schone's decision to select someone other than Hagan as senior manager of the Cleveland office. *Chappell v. GTE Prods. Corp.*, 803 F.2d 261, 266 (6th Cir. 1986) (A "defendant need not persuade the [trier of fact] that it was actually motivated by the proffered reasons, but need only produce admissible evidence which would allow the trier of fact rationally to conclude that the employment decision had not been motivated by discriminatory animus." (internal quotation marks and citations omitted)).

The burden then shifts to Hagan to show by a preponderance of the evidence that WEA's preferred reasons were pretextual: "(1) by showing the reasons had no basis in fact. (2) if they have a basis in fact, by showing that they were not the actual factors motivating the [demotion], or (3) if they were factors, by showing that they were jointly insufficient to motivate the [demotion]." *Chappell*, 803 F.2d at 266.

Hagan first argues that WEA's proferred reasons have no basis in fact because he would have been a good choice to head the district office. He insists that an absence of

disciplinary write-ups and a lack of criticism of his leadership skills by his subordinates suffices to show WEA's reasons have no basis in fact. Hagan highlights the opinion of Froio, who, unlike Schone, actually observed Hagan's work, and who, according to Hagan, "expressed no reservation about Pete Hagan as Sales Manager, and in fact, had said that he was very comfortable with Pete Hagan, in this role."

Although Hagan may indeed have been a good choice to head the Cleveland office, our inquiry focuses only on whether Schone's *belief* that Hagan would not be a good choice had a basis in fact. The record on summary judgment confirms the foundation of Schone's belief. Hagan does not dispute that Camelot contacted WEA management, including Schone, with concerns about Hagan heading the Cleveland office. Nor does he dispute that Schone knew about his dressing as a Nazi at a WEA event and behaving inappropriately while drunk in front of customers. Moreover, even Hagan's former boss, Froio, told Schone that he thought Hagan had weak personal skills. Because any or all of these facts could have been the basis of Schone's decision. Hagan's argument that Schone's decision had no basis in fact must fail.

Hagan next contends that WEA's proferred reasons did not actually motivate his "demotion." Lacking evidence to support this contention, Hagan offers only speculation that he was "demoted" so that an African-American could head the Cleveland office. We find speculation insufficient to establish pretext.

We conclude that because Hagan presented no evidence to rebut WEA's legitimate reasons for the actions taken in 1995, he is unable to establish a jury issue about whether these reasons were merely a pretext for discrimination.

Accordingly, we find that the district court properly granted summary judgment to WEA on his 1995 claims.

1999 Claims

Hagan contends that when WEA closed its Cleveland office in 1999, it should have considered him for both Field Sales Manager and Field Sales Manager of Black Music in Philadelphia. WEA first offered the Field Sales Manager position to Hill, who declined it. WEA then filled the position with Jeanne White, a young, African-American female who had been the long-time Field Sales Manager of Black Music in Philadelphia. WEA in turn hired Mary Ressner, also a young African-American female, to take White's previous position.

As a general rule, an employer who reduces its force for economic reasons need not transfer employees to other positions within the company. *Godfredson v. Hess & Clark, Inc.*, 173 F.3d 365, 374 (6th Cir. 1999). But when an employer chooses to transfer some displaced employees, it may not impermissibly discriminate in deciding whom to transfer. *Scott v. Goodyear Tire & Rubber Co.*, 160 F.3d 1121, 1126 (6th Cir. 1998). We have held that plaintiffs claiming that their employer unlawfully discriminated against them by failing to transfer them as part of a reduction in force must proffer "additional direct, circumstantial, or statistical evidence tending to indicate that the employer singled out [the plaintiffs] for discharge for impermissible reasons." *Barnes v. GenCorp Inc.*, 896 F.2d 1457, 1465 (6th Cir. 1990).

Even if Hagan did proffer such evidence, this claim would ultimately fail because he presents no evidence to rebut WEA's legitimate reasons for its transfers. Raymond Milanese, the person charged with filling the Philadelphia

managerial position, was personally familiar with Hill's but not Hagan's managerial abilities, as even Hagan concedes. Milanese's subjective evaluation of Hill's abilities serves as a legitimate, non-discriminatory reason for selecting Hill over Hagan for the transfer. *See Lerma v. Bolger*. 689 F.2d 589, 592 (6th Cir. 1982)

Hagan attempts to discount this proferred reason by speculating that if WEA had not brought Hill to manage the Cleveland office in 1995, then Hagan would have had the necessary relationship for Milanese to have selected him for the transfer. Such speculation has no relevance to the issue–Milanese's legitimate business reason for selecting the employee whose abilities he knew better.

And as far as the position of Field Sales Manager of Black Music is concerned. Hagan admitted the position required an intimate knowledge of black music and an ability to keep up with its quickly changing trends, and he himself did not like, understand, or follow today's black music. This factor, coupled with Hagan's having declined a sales job paying more than the Philadelphia job paid leaves Hagan without a basis for contending that WEA's failure to offer him the Field Sales Manager job constituted illegal racial discrimination.

Likewise, Hagan's argument that discriminatory motives led the company to deny him a transfer to Detroit lacks evidentiary support. WEA proffered its reason for failing to transfer him to serve as Detroit Field Sales Manager of Black Music–the position was never open. Patti Fullard held the position in the Cleveland office and continued to hold the same job serving the same clients when WEA transferred the job to the Detroit office. Because an employer has no duty to displace other employees in favor of an individual whose position has been eliminated by a reduction in force. WEA

articulated a legitimate business reason for not offering Hagan this position. *Sahadi v. Reynolds Chem.*, 636 F.2d 1116, 1118 (6th Cir. 1980).

Hagan counters that this reason lacks basis in fact because WEA had a policy or practice of allowing senior employees to "bump down" into lower paying junior positions that should have allowed him to bump down Fullard and assume her position. Yet Hagan offers as evidence of this policy only his own unsupported claim that three employees had "bumped" junior employees from their jobs, and the affidavit of one of those employees averring that. "This type of bumping is commonplace during times of downsizing." Schone, Froio, and Milanese denied knowledge of a practice or policy of bumping. Hagan's evidence does not show a clear policy of "bumping" existed, much less an impermissible denial in Hagan's case. Because WEA's proffered reason for failing to transfer Hagan to Detroit stands unrebutted. because Hagan was no more qualified to be Field Sales Manager of Black Music in Detroit than in Philadelphia, and because he was offered a higher paying sales job anyway, we assess no error by the district court on this claim either.

III.

Contrary to Hagan's assertions, there is no basis on which to overturn the district court's entry of summary judgment in favor of WEA. Accordingly, we affirm the judgment of the district court.

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

No. C-1- 00-412

[Filed April 24, 2002]

PETER M. HAGAN, Plaintiff,	)
v.	)
WARNER/ELEKTRA/ ATLANTIC CORP., Defendant.	)

ORDER

This matter is before the Court upon defendant's motion for summary judgment (doc. 22), plaintiff's opposing memorandum (doc. 24), plaintiff's highlighted copy of defendant's proposed findings of fact and conclusions of law (doc. 27), and defendant's reply in support of its motion (doc. 30).

I. Procedural history

Plaintiff, who at all material times was a resident of the State of Ohio, brings this action against defendant Warner/Elektra/Atlantic Corp. (WEA), a New York corporation. Plaintiff brings claims for age discrimination under the Age Discrimination in Employment Act (ADEA) and O.R.C. §§ 4112.02 and 4112.99, claims for race discrimination under Title VII of the Civil Rights Act, 42 U.S.C. § 2000e et seq., and O.R.C. §§ 4112.02 and 4112.99, claims for sex discrimination under Title VII and O.R.C. §§ 4112.02 and 4112.99, and a claim for violation of Ohio public policy. The claims arise out of plaintiff's alleged demotion in 1995 to the position of Field Sales Manger for defendant's Cleveland, Ohio office and from defendant's failure to offer plaintiff a position as Field Sales Manager or Field Sales Manager/Black Music in Philadelphia or Detroit following the elimination of plaintiff's position as part of the closure of defendant's Cleveland office in 1999. Plaintiff seeks reinstatement to the position of Sales Manager, back pay
and front pay and bonuses, compensatory and punitive damages, and attorneys fees.

II. Undisputed facts

The parties do not dispute the following facts:

1. Plaintiff is a white male who was 54 years old at the time he filed the complaint on May 23, 2000.

2. Defendant WEA is a music distribution company which at all relevant times engaged in the sale and distribution of phonograph records, audio cassette tapes, and compact disks out of a facility in Cleveland, Ohio, to various

wholesalers and retail outlets throughout the Midwest. WEA is ultimately a sales business.

3. WEA's operations are divided into different branches, each of which is responsible for a different geographic region of the country. Each branch office is headed by a Branch Manager, who is responsible for that branch office and the sales territories within the geographic limits of the branch. The branch offices are engaged not only in sales but in all aspects of WEA's operations, such as processing orders, billing, and the actual shipping of CDs and tapes. Each WEA branch has a number of smaller offices known as district sales offices which focus on sales. At a branch office, the day-to-day maintenance and operation of the office are the responsibility of the Branch Manager. The Sales Manager in a branch office concentrates solely on sales.

4. Both branch offices and district sales offices have other management-level sales personnel known as Field Sales Managers. Some Field Sales Managers focus on a single genre of music, such as Field Sales Manager of Country Music or Field Sales Manager of Black Music, while other Field Sales Managers are not so specialized. All Field Sales Managers report to a District Sales Manager or Branch Sales Manager.

5. Plaintiff began his employment with WEA as a Sales Representative in WEA's Cincinnati office in 1974. In 1986, plaintiff moved from Cincinnati to Cleveland to become the Field Sales Manager of the Cleveland Branch. In 1989, plaintiff became the Cleveland Branch Sales Manager. Plaintiff served in that capacity under Cleveland Branch Manager Freddie Katz until January of 1992 and under Branch Manager Rick Froio from 1992 until 1995.

6. The 1990s brought dramatic changes to the music industry. A number of WEA's major customers declared bankruptcy, consolidated, and/or merged. At the beginning of 1995, Froio announced his decision to leave the Cleveland Branch. As a result of the shrinking customer base and Froio's departure, WEA decided to downgrade the Cleveland office from a branch office to a district sales office in the spring of 1995. The Cleveland office then became a part of the Chicago branch headed by Denny Schone and plaintiff was made Field Sales Manager of the Cleveland office. As Field Sales Manager, plaintiff was the number two person in the Cleveland office. His pay and benefits were not affected by the office downgrade.

7. Dale Hill, an African-American, became District Sales Manager of the Cleveland office in June of 1995. He held the top position in the office.

8. Early in 1998, authority over the Cleveland district sales office was transferred from the Chicago branch to the Philadelphia branch in an effort to equalize workloads among the Branch Managers. Ray Milanese, Philadelphia's Branch Manager, became Hill's boss.

9. In May 1999, WEA shut down its Cleveland office because Camelot, its key customer which had accounted for at least 75% of WEA's sales, ceased its Ohio operations. Plaintiff understood the logic of closing the Cleveland office. As a result of the closing, the great majority of WEA's Cleveland employees lost their jobs without any offer of continued employment. A few select employees, including plaintiff, were offered the opportunity to remain employed with WEA.

10. Plaintiff was offered three different options when the Cleveland office closed. Those options were (1) accept a Sales Representative position with a salary of $64,000 per year, (2) enter into an 18-month consulting agreement requiring no more than 10 hours of work per month at a monthly salary of $4,011.00, or (3) accept an enhanced severance package worth $76,200.99. Plaintiff rejected all three options.

11. Plaintiff was not considered for any additional positions when the Cleveland office closed. He alleges that he should have been offered three other positions, which were (1) Patti Fullard's position as Field Sales Manager of Black Music; (2) Field Sales Manager in Philadelphia; and (3) Field Sales Manager of Black Music in Philadelphia.

12. As of 1999, Fullard had worked, as Field Sales Manager of Black Music for approximately ten years. She had been based in Cleveland but served both the Cleveland sales territory and portions of the Chicago territory, including Detroit. After the Cleveland office was closed, Fullard continued in her same job but was based out of a different office. Plaintiff admits that Fullard did a good job as Field Sales Manager of Black Music. Unlike Fullard, plaintiff did not like, did not understand, and did not follow "today's black music".

13. In the spring of 1999, Milanese had an opening for Field Sales Manager in Philadelphia. The opening existed because Milanese had promoted his Field Sales Manager, Sue Costello, to the position of Branch Sales Manager in December of 1998. When the Philadelphia Field Sales Manager position opened, Milanese first offered the position to Dale Hill, who declined the offer, and then

filled the position with Jeanne White, the long-time Philadelphia Field Sales manager of Black Music. Milanese never considered plaintiff for the position of Philadelphia Field Sales Manager.

14. As Branch Sales Manager, Costello selected Mary Ressner, a Sales Representative in the Philadelphia office, to fill the Field Sales Manager of Black Music position vacated by White.

15. Although plaintiff learned in the spring of 1995 that he was not going to become the District Sales Manager in the Cleveland office, he did not file an EEOC charge until October 19, 1999, over four years after the alleged discriminatory decision. He then amended his charge and claimed that he should have been made a Field Sales Manager of Black Music in either Detroit or Philadelphia.

III. Motion for summary judgment

Defendant moves for summary judgment on the ground that plaintiff has no evidence to establish a prima facie case of discrimination on the basis of race, sex or age. Defendant contends that plaintiff's race and sex discrimination claims must fail because he cannot demonstrate that WEA is "that unusual employer that discriminates against the majority," i.e., white, middle-aged men. Defendant notes that a majority of WEA's management staff are themselves white, middle-aged men. Defendant contends that the fact that the individual who decided against plaintiff for a position in 1995 was in the protected group for age discrimination and was only two years younger than plaintiff is significant evidence weighing against a finding of discrimination. Defendant asserts that plaintiff's attempt to establish a prima facie case of race discrimination fails on the additional ground that plaintiff has

offered no evidence that similarly-situated black employees received more favorable treatment. Defendant also contends that it is entitled to summary judgment because even assuming plaintiff has evidence to support a prima facie case, he has no evidence of pretext.

A. Motion for summary judgment on claims based on the 1995 employment action

Defendant argues that in addition, to being unable to establish that it is that unusual employer who discriminates against the majority and that plaintiff was treated less favorably than similarly-situated black employees, plaintiff cannot establish the prima facie element of a materially adverse employment action with respect to the 1995 employment action. Defendant asserts that plaintiff did not suffer a loss of salary or benefits, his job responsibilities did not significantly change, and plaintiff remained the number two person in the Cleveland office.

Defendant contends that even if plaintiff were able to establish a prima facie case, he cannot show that WEA's legitimate, nondiscriminatory reasons are pretextual. With respect to the 1995 decision and plaintiff's claims of race and age discrimination based thereon, defendant alleges that Denny Schone wanted the Cleveland District Sales Manager to be a strong leader with good people skills and to not be objectionable to Camelot, the key customer, whereas the top purchasing official at Camelot had repeatedly requested of Schone and others that plaintiff not be put in charge of the Cleveland territory; Camelot's negative reaction to plaintiff reinforced Schone's belief that plaintiff was not sufficiently active with customers and generally not adequately involved in the day-in and day-out sales and marketing functions of his position to take over the Cleveland office; and Schone

questioned plaintiff's leadership and judgment, especially in light of the fact that plaintiff had dressed up as a Nazi in front of customers and WEA employees and had performed drunken antics before customers.

Defendant also asserts that plaintiff's claims based on the 1995 decision are time-barred because plaintiff did not file an EEOC charge until October, 1999.

B. Motion for summary judgment on claims based on the closing of the Cleveland office

Defendant alleges that plaintiff cannot establish a prima facie case of age, sex or race discrimination with respect to the 1999 closing of the Cleveland office. Defendant asserts that plaintiff cannot show a materially adverse employment action because he was offered options for continued employment. Defendant notes that the salary for the Sales Representative position offered to plaintiff was larger than any of the salaries paid to those individuals transferred to the positions which plaintiff contends he should have been offered. Furthermore, defendant claims that plaintiff was not qualified for Fullard's position and was not similarly situated in all respects to Fullard and that defendant was under no duty to displace Fullard, who continued in her same job but was based out of a different office. Defendant also contends that it did not discriminate against plaintiff by not offering him the opportunity to transfer to the Field Sales Manager position in Philadelphia. Defendant asserts that plaintiff failed to express specific interest in the position; the key factor in Milanese's selection of the Manager was a close working relationship with Milanese, which plaintiff implicitly concedes and which plaintiff lacked; and plaintiff has not presented any credible evidence of the qualifications, experience or job performance

of the individual ultimately selected for that position, i.e., White.

In addition, defendant asserts that plaintiff was not qualified for and was never considered for the Field Sales Manager of Black Music position received by Mary Ressner because the decision maker, Costello, did not know that plaintiff had any interest in the position and plaintiff was not qualified for the position because he did not understand and did not follow "today's black music". Also, defendant states that plaintiff has not presented any evidence regarding Ressner's qualifications.

IV. Plaintiff's response

A. Evidence of reverse race discrimination

Plaintiff suggests that there is direct evidence of reverse race discrimination in the form of WEA's Affirmative Action Plan, which goes beyond a general well-intentioned purpose of seeking out qualified black applicants, advancing qualified minorities into open management positions, or offering extra training and education to upwardly mobile black employees, and establishes a goal to aggressively strive to increase the number of minorities at WEA. Plaintiff alleges that the existence of an affirmative action plan, together with evidence that the plan was followed in an employment decision, constitutes direct evidence of unlawful discrimination unless the plan is valid. Plaintiff alleges that the WEA Affirmative Action Plan is not valid because it does not set specific dates for its fulfillment; there is no evidence that WEA's Affirmative Action Plans were promulgated in the face of an actual court finding of discrimination or as part of a consent decree; and an employer cannot rely on an Affirmative Action Plan as a defense to reverse race discrimination when its

personnel decisions at issue were not taken pursuant to that plan. Plaintiff concedes that WEA does not cite its Affirmative Action Plan as the basis for its 1995 decision, but plaintiff claims that he has adduced other circumstantial evidence on which a jury could rely to find that defendant was motivated by its illegal Affirmative Action Plan. Plaintiff submits that there is a factual dispute that the jury must resolve as to whether defendant acted pursuant to its plan. Plaintiff asserts in support of his "direct evidence" argument that there is a substantial amount of circumstantial evidence clearly suggesting that defendant was motivated by pure racial considerations when it promoted Dale Hill to take plaintiff's position. Plaintiff therefore argues that the question of whether there is direct evidence of reverse racial discrimination should go to the jury.

Plaintiff also contends that he has adduced sufficient evidence from which a jury could conclude that he has met his prima facie case for both the 1995 and 1999 employment actions. As "background circumstances" which purportedly indicate that WEA is that kind of employer who discriminates against the majority, plaintiff points to WEA's adherence to its allegedly invalid 1997 Affirmative Action Plan; statements by the President of an independent distribution arm of WEA's parent company published in a magazine in 1995 stating that his sales force was much younger than that of the major companies and that the employees were knowledgeable about the music and involved in the music; statements by WEA's president, David Mount, published in the same magazine in 1994 stating that WEA had a goal to improve the representation of minorities on staff and to promote minority employees; circulation by WEA headquarters representative Kevin Carney of a 1997 article regarding pressure by Reverend Jesse Jackson's Rainbow/Push Coalition to increase the number of African-Americans and women in the record

industry and bemoaning the lack of black managers in areas other than black music; WEA's personnel policies recognizing the need to take affirmative steps to ensure equal employment opportunities for all and to vigorously pursue the hiring and promotion of minorities; WEA's monitoring of the number of minorities occupying management positions in the company; memoranda by various members of management regarding minority representation; and statements by management touting the number of management positions held by women and minorities.

B. Race discrimination claim based on the 1995 employment action

As additional evidence of reverse discrimination with respect to the 1995 employment action, plaintiff notes that he was never advised by any of his superiors that his job performance had been found to be lacking in any way; he was never informed of complaints by customers or employees; he never received progressive discipline; overall, Froio was very satisfied with plaintiff's performance; there exists substantial record evidence that Dale Hill was manifestly less qualified for the position of Sales Manager by virtue of his lack of experience; and there was evidence of "something fishy going on" in that the home office for the first time took the lead in pushing Hill as the primary candidate for the Sales Manager job and plaintiff was given little or no consideration for the job. Plaintiff also alleges that the racial composition of the decision makers is not dispositive and is only a factor for the jury to consider. Plaintiff concedes that he cannot show that he was similarly situated to Dale Hill and other black employees since there were no other similarly-situated black sales managers, but plaintiff contends that this is not fatal to his claims since the *McDonnell-Douglas* formula is not a rigid, mechanistic one.

Plaintiff also alleges that the reasons for promoting Dale Hill and demoting plaintiff in 1995 are pretextual. He summarizes the reasons as follows: Plaintiff was not a strong leader with good people skills, plaintiff was objectionable to Camelot Records, one of the key customers in the Cleveland marketplace, and plaintiff had several lapses in judgment reflected in his wearing a Nazi uniform at a costume party and being under the influence of alcohol on other occasions. Plaintiff alleges that these reasons are pretextual because the testimony offered by Dennis Schone regarding Camelot's Lou Garrett's alleged dissatisfaction with plaintiff is hearsay; Froio testified that he had no real problems with plaintiff's managerial skills; plaintiff was never counseled on his job performance; there is no evidence that he was ever warned or counseled about the Nazi costume, Schone never cited it to plaintiff as a reason why he would not get the job, and the incident occurred long before 1995; and plaintiff's indiscretions stemming from his alcohol use had happened over 15 years earlier and plaintiff was never counseled for them. Plaintiff also contends that he did suffer an adverse action in 1995 because he had substantially less authority and responsibility as Field Sales Manager than he had as Sales Manager, he had to report to a new Sales Manager, and he was no longer permitted to deal with higher members of management without first going through Hill. Finally, plaintiff concedes that his federal claims of unequal treatment in 1995 are time-barred but asserts that his claims under Ohio law were timely filed.

C. Race discrimination claim based on the 1999 closing

In order to establish unlawful discrimination in connection with the 1999 closing, plaintiff offers the same "direct" evidence of reverse discrimination offered to prove that he was unlawfully demoted in 1995. As further "direct" evidence of discrimination, plaintiff notes that WEA's Affirmative Action Plan and related documentation continued in effect and that the position of Field Sales Manager of Black Music has always been occupied by black employees across the country.

Plaintiff contends that circumstantial evidence of an unlawful discriminatory motive exists in that plaintiff was treated differently than Hill, who was similarly-situated to him. Plaintiff alleges that defendant promoted the interests of Hill over those of plaintiff despite Hill's unsatisfactory track record as Cleveland Sales Manager and despite the fact that plaintiff had been performing the Field Sales Manager job in Cleveland. Plaintiff also contends that he was bypassed for the position of Field Sales Manager in the Plliladelphia office in favor of a black employee, Jeanne White, who had never performed as a Field Sales Manager and who was less qualified than plaintiff, and that he was bypassed for the position of Field Sales Manager of Black Music in Philadelphia in favor of Mary Ressner, a black employee with a poor performance record who had not previously held a management position. Plaintiff contends that a reasonable jury could find "something fishy" in WEA's decision to pass plaintiff over for the open management position in Philadelphia in favor of three patently less qualified African-American employees.

Plaintiff argues that the reasons proffered by defendant for not offering him the management positions are pretextual, the

reasons being: (1) during a reduction in force, WEA had no legal duty to allow plaintiff to bump Fullard out of her job as Field Sales Manager in Cleveland, (2) plaintiff was unable to perform the job of Field Sales Manager of Black Music, (3) plaintiff never exhibited interest in the Philadelphia jobs and Milanese did not know he was interested in those jobs, (4) plaintiff had not had frequent and substantial interaction with Milanese as had Hill, White and Ressner, and (5) there is no evidence that White was inferior to plaintiff in terms of talent, experience and other credentials. Plaintiff contends that while an employee is not legally entitled to displace another employee whose position has been eliminated, WEA's refusal to offer him one of the Philadelphia positions ran contrary to the company's long-standing policy to bump managers to the next lowest managerial position and to bump other individuals from the lower positions rather than lay managers off during a period of downsizing. Plaintiff alleges that he was also denied the opportunity to bump Fullard, a younger black female, out of her position as Field Sales Manger of Black Music in the Cleveland Office, which position was moved to Detroit after the closure. Plaintiff also contends that defendant has no evidence to support a generalization that because plaintiff did not enjoy or understand black music, he could not excel at selling it. Plaintiff also argues that he did not show interest in the Philadelphia job because he was never told of the Field Sales Manager position in Philadelphia and the job was not posted. Plaintiff further argues that the offer of a position which entailed a decrease in yearly salary from approximately $100,000 to $64,000 was an adverse employment action.

D. Sex discrimination claim based on the 1999 closing

Plaintiff relies on the same arguments proffered in support of his 1999 race discrimination claim to show that he was

discriminated against on the basis of his sex when defendant filled open positions in other offices with equally or less qualified females.

E. Age discrimination claims

Plaintiff alleges that he can also establish, a prima facie case of age discrimination arising from the 1995 employment action and that he has come forward with credible evidence which suggests that the reasons offered for his alleged demotion are pretextual. As to the requirement that he come forward with additional circumstantial evidence of discrimination in connection with the 1999 employment action in view of the fact that he was terminated as part of a reduction in force, plaintiff alleges that the same evidence which demonstrates reverse race discrimination supports a finding of age discrimination. Plaintiff also asserts that the Sixth Circuit now holds that an employer's failure to transfer an older reduction-in-force victim to a position elsewhere in the company is circumstantial evidence supporting a finding of age discrimination. Plaintiff further contends that defendant has not offered any reason as to why Hill, White or Ressner were more qualified than plaintiff for the positions they were offered.

V. Defendant's reply

In reply, defendant asserts that plaintiff's evidence of WEA's discriminatory mind-set in fact simply reflects WEA's compliance with federal regulations regarding affirmative action required of WEA as a government contractor; the employment decisions affecting plaintiff were not made pursuant to the Affirmative Action Plan; comments by non-decision makers have no relevance to this lawsuit; newspaper articles that do not involve WEA have no relevance to this

case; comments about goals to improve and promote minority representation are not discriminatory; plaintiff's lack of a disciplinary record is irrelevant because plaintiff was not fired for sustained bad performance; WEA does not post openings for management positions so that its failure to do so in this case is not evidence of discrimination; plaintiff was aware of the openings in the Philadelphia branch, and the decision makers had no idea that plaintiff was interested in the positions; there is no evidence of a WEA "bumping policy" as alleged by plaintiff; the Sixth Circuit has never adopted the "something fishy" standard espoused by certain federal courts; the Cleveland District Sales Manager position was first offered to Larry Bole, a white male, before it was offered to Hill; Froio, a white male, had recommended against plaintiff for the position of Cleveland District Sales Manager; plaintiff cannot show that he was treated differently from similarly-situated employees; plaintiff cannot establish pretext; plaintiff was one of the few employees who was offered another position when the Cleveland office closed and there were no similarly-situated employees who were transferred; plaintiff has not shown that Fullard, Ressner and White were less qualified for the positions they were offered; and the fact that individuals younger than plaintiff received certain jobs is not evidence of age discrimination.

VI. Summary judgment standard

Fed. R. Civ. P. 56 allows summary judgment to secure a just and efficient determination of an action. This Court may only grant summary judgment as a matter of law when the moving party has identified, as the basis for its motion, an absence of any genuine issue of material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317, 327 (1986).

The party opposing a properly supported motion for summary judgment "may not rest upon the mere allegations or denials of his pleading, but ... must set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby,* 477 U.S. 242, 248 (1986) *(quoting First Nat'l Bank of Arizona v. Cities Serv. Co.*, 391 U.S. 253 (1968)). The evidence of the nonmovant is to be believed and all justifiable inferences are to be drawn in his favor. *Anderson,* 477 U.S. at 255 *(citing Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158 (1970)). Summary judgment is not proper in employment discrimination cases when there is a substantial issue of fact as to whether an employer had a discriminatory intent or motive. *Leonard v. City of Frankfort Elec. & Water Plant Bd.*, 752 F.2d 189, 193 (6th Cir. 1985) *(citing Byrd v. Roadway Express, Inc.*, 687 F.2d 85 (5th Cir. 1982); *Williams v. DeKalb County,* 82 F.R.D. 10 (N.D. Ga. 1979)).

The court is not to weigh the evidence and determine the truth of the matter but is to decide whether there is a genuine issue for trial. *Anderson,* 477 U.S. at 249. There is no genuine issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. *Id.* at 249 *(citing Cities Serv.*, 391 U.S. at 288-289). If the evidence is merely colorable, *Dambrowski v. Eastland,* 387 U.S. 82, 84 (1967), or is not significantly probative, *Cities Serv.*, 391 U.S. at 290, judgment may be granted. *Anderson*, 477 U.S. at 249.

VII. Applicable law

Under the law of this Circuit, the same evidentiary framework applies to discrimination claims brought under Title VII, the ADEA, and state law. *Allen v. Ethicon, Inc.*, 919 F. Supp. 1093, 1098 (S.D. Ohio 1996)(Weber, J.)*(citing Mitchell v. Toledo Hospital,* 964 F.2d 577, 582 (6th Cir.

1992)). In order to establish an employment discrimination claim, plaintiff must introduce direct evidence of discrimination or prove inferential and circumstantial evidence which would support an inference of discrimination. *Kline v. TVA,* 128 F.3d 337, 348 (6th Cir. 1997). Plaintiff need only prove direct or circumstantial evidence, not both. *Id.* at 348-49. A plaintiff alleging reverse race discrimination can prove his case either by adducing evidence that race was a direct factor in the employment decision, or, alternatively, by adducing indirect evidence. *Weberg v. Franks*, 229 F.3d 514, 522-23 (6th Cir. 2000).

Direct evidence is "that evidence which, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions." *Jacklyn v. Schering-Plough Healthcare Prods. Sales Corp.*, 176 F.3d 921, 926 (6th Cir. 1999)(citations omitted). Direct evidence makes the existence of unlawful discrimination "patent." *Weberg,* 229 F.3d at 524 (citing *Bartlik v. United States Department of Labor,* 73 F.3d 100, 103 n. 5 (6th Cir. 1996)). Evidence which requires the jury to infer a fact is not direct evidence. See *Manzer v. Diamond Shamrock Chems. Co.*, 29 F.3d 1078, 1081 (6th Cir. 1994). Once the plaintiff has produced credible direct evidence, the burden of persuasion shifts to the defendant to show that it would have taken the challenged action if it had not been motivated by discrimination. *Jacklyn,* 176 F.3d at 926 (citations omitted). If plaintiff presents direct evidence of discrimination, the *McDonnell-Burdine* paradigm is of no consequence. *Kline,* 128 F.3d at 349.

If direct evidence of discrimination is lacking, plaintiff must prove a prima facie case of discrimination. In order to establish a prima facie case, the plaintiff must show:

> 1) that he is a member of a protected group, 2) that he was subject to an adverse employment decision, 3) that he was qualified for the position, and 4) that he was replaced by a person outside of the protected class.

Kline, 128 F.3d at 349. Plaintiff may establish the fourth prong of a prima facie case by showing that he was treated less favorably than a similarly- situated employee outside of his protected class. *See Betkerur v. Aultman Hosp. Ass'n,* 78 F.3d 1079, 1095 (6th Cir. 1996); *Mitchell v. Toledo Hospital,* 964 F.2d 577, 582-83 (6th Cir. 1992). In such a case, plaintiff must prove that all relevant aspects of his employment situation were similar to those of the non-minority employee with whom he seeks to compare himself. *Ercegovich v. Goodyear Tire & Rubber Co.,* 154 F.3d 344, 352 (6th Cir. 1998).

In reverse discrimination cases, the showing required to establish a prima facie case of discrimination is modified. *Murray v. Thistledown Racing Club, Inc.,* 770 F.2d 63, 66-68 (6th Cir. 1985); *Sampson v. Secretary of Transportation,* 182 F.3d 918 (Table)(6th Cir. June 23, 1999)(unpublished decision). Under the modified analysis, a plaintiff seeking to establish a prima facie case of reverse discrimination must show that: (1) "background circumstances support the suspicion that the defendant is that unusual employer who discriminates against the majority", and (2) plaintiff was treated differently than similarly-situated members of a protected group. *Pierce v. Commonwealth Life Insurance Co.,* 40 F.3d 796, 801 (6th Cir. 1994). Although the Court in *Pierce* expressed serious misgivings about a test which imposes a more onerous standard for a white plaintiff than for minority or female plaintiffs, the Court did not address this issue since it was unnecessary to the court's decision. *Id.* at

801 n.7. The Sixth Circuit continues to apply the test (see, e.g., *Yeager v. GM Corp.*, 265 F.3d 389, 397 (6th Cir. 2001) and *Campbell v. Hamilton County Ohio,* 23 Fed. Appx. 318, 2001 WL 1322785 (6th Cir. Oct. 17, 2001)) and earlier cases applying the test remain good law.

A plaintiff can establish background circumstances by producing evidence of the defendant's unlawful consideration of race in the past which justifies the "suspicion that incidents of capricious discrimination against whites because of their race may be likely." See *Jamison v. Storer Broadcasting Co.*, 830 F.2d 194 (Table), 1987 WL 44901 (6th Cir.)(citing *Parker v. Baltimore & Ohio R.R. Co.*, 652 F.2d 1012, 1017 (D.C. Cir. 1981)). In its unpublished decision in *Sampson,* a panel of the Sixth Circuit determined that plaintiff had established a prima facie case of reverse discrimination when he submitted a large number of defendant's policies and procedure reflecting an organizational preference for establishing a diverse group of employees, but the Court went on to determine that the mere existence of affirmative action policies was insufficient to prove intentional discrimination against the plaintiff and that the plaintiff had not shown that the defendant had relied on these policies in selecting a minority individual for a position. Other federal circuits have found sufficient background circumstances to establish a prima facie case where there is some evidence that the employer has some reason or inclination to discriminate invidiously against whites or where there is evidence indicating that there is something "fishy" about the facts of the case that raises an inference of discrimination. *Harding v. Gray,* 9 F.3d 150, 154 (D.C. Cir. 1993)(citations omitted). The Court in *Harding* also stated that if a more qualified white employee is denied a promotion in favor of a minority employee with lesser qualifications, that in itself raises an

inference that defendant is that unusual employer who discriminates against the majority. *Id.* at 153-54.

Conversely, the fact that a majority of an employer's management staff are white men is evidence that the employer does not discriminate against the majority. *Garnet v. General Motors Corp.,* 114 F. Supp.2d 649, 657-58 (N.D. Ohio 2000). The Court in *Garnet* noted that the statistical evidence offered by the defendant in that case clearly established that defendant employed substantially more white males than women or racial minorities, *id.* at 657. The Court found no proof that defendant GM discriminates against white males and stated that merely administering a program which affords women and minorities greater opportunities to obtain positions in a workforce that is dominated by white males does not rise to the level of intentional discrimination against the majority. *Id.*

If plaintiff establishes his prima facie case, the burden then shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the adverse employment decision. *McDonnell Douglas Carp. v. Green,* 411 U.S. 792 (1973) and *Texas Dept. of Community Affairs v. Burdine,* 450 U.S. 248 (1981). This is required in a reverse discrimination case as in all other discrimination cases. *Sampson,* 182 F.3d 918. If the defendant carries its burden, the plaintiff must prove that the proffered reason is pretextual. *McDonnell Douglas,* 411 U.S. 792; *Burdine,* 450 U.S. 248. The plaintiff can establish pretext by a direct showing that a discriminatory reason more likely motivated the employer or by indirectly showing that the employer's reason is not credible. *Kline,* 128 F.3d at 342-43. Under appropriate circumstances, "a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer

unlawfully discriminated." *Reeves v. Sanderson Plumbing Products, Inc.*, 120 S.Ct. 2097, 2109 (2000).

In a failure to promote case, the plaintiff does not have to establish that he applied for and was considered for a promotion when the employer does not notify its employees of the available promotion or does not provide a formal mechanism for employees to express an interest in the promotion. *Dews v. A.B. Dick Company,* 231 F.3d 1016, 1022 (6th Cir. 2000). Instead the company is obligated to consider all those who might reasonably be interested in a promotion were its availability made generally known. *Id.*

An employer who reduces its work force for economic reasons is not required to transfer an employee whose position has been eliminated or to displace workers with less seniority. *Simpson v. Midland-Ross Corp.*, 823 F.2d 937, 942 n.6 (6th Cir. 1987); *Barnes v. GenCORP, Inc.*, 896 F.2d 1457, 1469 (6th Cir. 1990). However, the employer violates the anti-discrimination laws when it transfers other displaced employees but does not place the plaintiff in a new position because of discrimination. *Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344, 351 (6th Cir. 1998). In a reduction of force situation, the plaintiff must come forward with additional direct, circumstantial or statistical evidence that age, race or sex was a determining or motivating factor in his termination. *Ridenour v. Lawson Co.*, 791 F.2d 52, 57 (6th Cir. 1986). An employee denied the opportunity to transfer establishes a prima facie case of discrimination when he produces evidence demonstrating that:

> 1) he or she is a member of a protected class; 2) at the time of his or her termination he or she was qualified for other available positions within the corporation; 3) the employer did not offer such positions to the

> plaintiff; and 4) a similarly-situated employee who is not a member of the protected class was offered the opportunity to transfer to an available position, or other direct, indirect, or circumstantial evidence supporting an inference of discrimination.

Ercegovich, 154 F.3d at 351. For purposes of establishing his prima facie case, the plaintiff must establish that the individuals with whom he seeks to compare himself were "similarly situated in all of the relevant aspects." *Ercegovich,* 154 F.3d at 351; *Pierce,* 40 F.3d at 802. An employer's decision to redeploy younger employees while not redeploying older employees is a recognized form of adverse employment action. *Scott v. The Goodyear Tire & Rubber Co.,* 160 F.3d 1121, 1128-29 (6th Cir. 1999)(citing *Hawley v. Dresser Industries, Inc.,* 958 F.2d 720, 723 (6th Cir. 1992)).

In considering whether an employment action was materially adverse, the Court should consider whether the plaintiff suffered a demotion as evidenced by a decrease in wage or salary, a material loss of benefits, or significantly diminished material responsibilities, or other indices that might be unique to the plaintiff's particular situation, *Id.* (citing *Crady v. Liberty Nat'l Bank and Trust Co.,* 993 F.2d 132, 136 (7th Cir. 1993)). "[A] change in employment conditions 'must be more disruptive than a mere inconvenience or an alteration of job responsibilities.'" *Kocsis,* 97 F.3d at 886. In the constructive discharge context, the Sixth Circuit has affirmed a district court ruling setting forth the general rule that "[b]arring unusual circumstances,... a transfer at no loss of title, pay, or benefits does not amount to... [an] adverse employment action." *Id. (citing Darnell v. Campell County Fiscal Court,* 731 F. Supp. 1309, 1313 (E.D. Ky. 1990), *aff'd,* 924 F.2d 1057 (6th Cir. 1991)(Table).

VIII. Opinion

A. Claims arising from the 1995 employment action

Defendant does not dispute that plaintiff's state law claims of reverse discrimination and age discrimination arising from the 1995 decision to promote Dale Hill to the position of Sales Manager of the Cleveland office and to place plaintiff in the Field Sales Manager position are not time-barred. Accordingly, the Court will consider the claims on their merits.

The Court finds that defendant is entitled to summary judgment on plaintiff's claims of reverse race discrimination and age discrimination stemming from the 1995 decision. Plaintiff has not come forward with evidence which, if believed, establishes that the change in his position was a materially adverse action. It is undisputed that plaintiff received no cut in salary and that his benefits remained unchanged as a result of the change. Plaintiff alleges, however, that he was demoted in terms of his stature and responsibility. Plaintiff contends that as Cleveland Field Sales Manager, he had substantially less authority and responsibility than he had commanded as Sales Manager, he had to report to a new Sales Manager, Hill, who was many years his junior and who reinforced plaintiff's sense of subordination upon his arrival at the Cleveland facility, and his day-to-day responsibilities were significantly diminished. Plaintiff makes no specific allegations, however, to support a finding that his responsibilities and duties were modified to such a degree that the change in positions constituted a materially adverse employment action.

More importantly, plaintiff has not shown that he suffered any damages as a result of the change in positions. Plaintiff

does not allege that his working conditions were intolerable or that they resulted in his constructive discharge. To the contrary, plaintiff continued in the Field Sales Manager position for four years until the decision to close the Cleveland office was made. Because plaintiff has not come forward with sufficient evidence to permit a finding that he suffered a materially adverse change in his employment situation or a constructive discharge, or that he suffered any damages as a result of the 1995 employment action, he cannot establish his discrimination claims arising from the 1995 decision.

Plaintiff's claim of reverse discrimination arising from the 1995 decision must fail for the additional reason that plaintiff has not come forward with direct evidence of discrimination or circumstantial evidence sufficient to establish a prima facie case. Plaintiff alleges that there is direct evidence of reverse discrimination in connection with the 1995 decision. Plaintiff argues that the existence of WEA's alleged facially invalid Affirmative Action Plan and ancillary documents in this case, coupled with circumstantial evidence that defendant was motivated by the Plan, suggests that defendant was motivated by pure racial considerations when it promoted Dale Hill to take plaintiff's position. Plaintiff has cited no cases from the United States Supreme Court or the Sixth Circuit, however, which support his position that WEA's Affirmative Action Plan is invalid because it lacks specifics or because it unnecessary trammels the interests of majority employees.

Irrespective of the validity of WEA's plan, the Court declines to adopt the position that WEA's Affirmative Action Plan, coupled with other evidence of record, constitutes direct evidence of discrimination based on plaintiff's race. In support of his position, plaintiff cites several cases from other circuits holding that an affirmative action plan may constitute

direct evidence of discrimination, even when the employer denies having acted pursuant to the plan. See, e.g., *Bass v. Board of County Commissioners,* 256 F.3d 1095, 1110 n.7 (11th Cir. 2001)(likening an affirmative action plan to statements by decision makers clearly evincing a discriminatory intent and obviating the need to rely on an inference of discrimination). Under the established law of this Circuit, however, direct evidence is that evidence which, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer's decision. The mere existence of an affirmative action plan, coupled with other circumstantial evidence of discrimination, does not require that conclusion, particularly where the employer has denied acting pursuant to the plan and there is no direct evidence to the contrary. Accordingly, WEA's Affirmative Action Plan, statements made by individuals within WEA regarding a goal to increase minority representation within WEA's workforce, and the compilation of statistics reflecting minority representation at WEA do not constitute direct evidence that defendant acted with a discriminatory motive.

Construing WEA's Affirmative Action Plan and the statements cited by plaintiff as circumstantial evidence, such evidence, if believed, does not support a finding that defendant is that unusual employer who discriminates against the majority. First, although plaintiff alleges that there is a question of fact for the jury as to whether defendant relied on the Plan in making the decisions in issue, plaintiff has not come forward with any evidence to support a finding that defendant did rely on the Plan in making these particular personnel decisions. Second, defendant notes that as a government contractor with at least $50,000 worth of government contracts per year, it is required to maintain an Affirmative Action Plan designed to ensure equal employment opportunities, to disseminate the Plan internally and

externally, to monitor and examine its employment decisions and compensation systems to evaluate the impact of those systems on women and minorities, and to maintain and make available documentation of its compliance with federal regulations. See 41 C.F.R. §§ 60-2.1(b)(1)(i), 60-2.10(a)(2) and (c) and 60-2.17(d). While defendant's federally-mandated compliance with these regulations does not insulate it from liability for reverse discrimination, neither do defendant's compliance and statements related thereto support a finding that defendant is that unusual employer who discriminates against the majority.

Plaintiff has failed to come forward with additional circumstantial evidence indicating that the individuals involved in the decision to move plaintiff to a different position, each of whom is a white male, discriminated against members of their own race. Consistent with the Sixth Circuit's requirements for establishing a prima facie case of reverse discrimination, plaintiff may not establish his prima facie case simply by showing that he was treated less favorably than a minority individual. Rather, plaintiff must come forward with evidence of background circumstances which support a finding that defendant is that unusual employer who discriminates against the majority. Plaintiff has not carried his burden. There is no evidence of unlawful consideration of race as a factor in past hiring or promotion decisions which justifies a suspicion that discrimination against whites based on their race may be likely. See *Jamison,* 830 F.2d 194 *(citing Parker v. Baltimore & Ohio R.R. Co.,* 652 F.2d 1012, 1017 (D.C. Cir. 1981)). There is no statistical evidence in the record which establishes that defendant employed a disproportionate number of racial minorities and females in management positions (see, e.g., *Yeager,* 265 F.3d at 397)(evidence that GMC is that unusual employer who discriminates against the majority was lacking

where statistics showed that a large percentage of candidates in defendant's apprenticeship program were white men). There is no evidence that defendant went beyond its stated goal of attempting to foster and achieve diversity within its workforce and denied non-minority individuals positions for which they were qualified because of their race. In view of the absence of such supporting evidence sufficient to establish the first prong of a prima facie case of reverse discrimination, plaintiff's claim of reverse race discrimination arising out of the 1995 employment action must fail.

B. Claims arising from the 1999 Cleveland office closing

Plaintiff asserts claims of race, sex and age discrimination arising out of the 1999 closing of the Cleveland office. Plaintiff concedes that the 1999 closure was a legitimate reduction in force. Plaintiff contends, however, that defendant's failure to transfer him to specified positions available in other offices was based on plaintiff's race, gender and age.

Plaintiff has not produced direct evidence of discrimination in connection with the 1999 employment action. The Court finds that plaintiff has also failed to establish a prima facie case of discrimination based on defendant's failure to transfer him to particular positions which plaintiff desired. First, for the reasons stated above, plaintiff has failed to come forward with sufficient evidence which, if believed, supports a finding that defendant is that unusual employer who discriminates against the majority so as to permit plaintiff to proceed with his reverse race and sex discrimination claims.

Second, plaintiff has not shown that he was treated differently than similarly-situated minority individuals or

females and younger employees. This is not a situation where defendant declined to place plaintiff in a new position while transferring other displaced employees. Rather, it is undisputed that defendant offered plaintiff continued employment as a Sales Representative at a salary of $64,000 per year and that the majority of employees in the Cleveland office were not offered different positions within the company. Plaintiff has identified only one other employee from the Cleveland office who was offered a new position and that is Dale Hill, who was offered the Field Sales Manager position in Philadelphia but declined the offer. Defendant's offer of a position to Dale Hill does not support plaintiff's reverse discrimination and age discrimination claims. First, there is no indication in the record that the position offered to Hill was more favorable than that offered to plaintiff in terms of salary and benefits. Second, plaintiff and Hill were not similarly situated in all relevant respects at the time the Cleveland office closed. Rather, Hill was the person in charge of the Cleveland office and reported directly to Milanese, the Philadelphia Branch Manager, while plaintiff was the second-in-command and reported to Hill. Although plaintiff claims that he should not be required to show that he was treated differently than similarly-situated minority individuals because there were no black managers who were similarly situated to him, plaintiff has not come forward with other evidence to establish a prima facie case of reverse race discrimination.

Plaintiff also alleges that he was treated less favorably than Fullard, another individual from the Cleveland office. It is undisputed, however, that Fullard did not assume a new position after the Cleveland office closed but continued to perform her same job out of a different office. Defendant had no legal obligation to bump Fullard from her position, and its decision to allow her to retain her position is not evidence of discrimination. Plaintiff has not identified the other employees

in the Cleveland office who were offered new positions and those who were not, so that the record does not establish that plaintiff received less favorable treatment than younger, minority and female employees displaced as a result of the office closure.

Defendant's failure to offer plaintiff the position of Philadelphia Field Sales Manager or Field Sales Manager of Black Music in Philadelphia is likewise not sufficient to establish plaintiff's prima facie case. Plaintiff has not shown tlaat he was treated less favorably than the black females who assumed those positions, White and Ressner, since the salary offered to plaintiff for the Sales Representative position was more than the salaries paid to White and Ressner in their new positions. Moreover, White and Ressner were not similarly situated to plaintiff. These employees were not employees of the Cleveland Branch who were displaced by the closing of that office but were employees of the Philadelphia Branch Office. Defendant's decision to promote these individuals to positions within their own branch instead of offering the positions to plaintiff is not evidence that defendant acted with a discriminatory intent. Plaintiff has not offered other direct, indirect or circumstantial evidence which supports an inference of discrimination.

IX. Conclusion

Plaintiff's claims of discrimination under federal law based on defendant's 1995 decision are time-banned, so that defendant is entitled to summary judgment on these claims. Plaintiff has failed to establish discrimination based on direct evidence or a prima facie case of discrimination under state law with respect to tlae 1995 employment action. Plaintiff has also failed to establish his discrimination claims arising from the closing of the Cleveland office in 1999 and defendant's

failure to offer plaintiff certain other positions after his was eliminated. Accordingly, defendant is entitled to summary judgment on those claims.

It is therefore ORDERED that defendant's motion for summary judgment is GRANTED. This case is DISMISSED with prejudice at plaintiff's cost and is TERMINATED on the docket of this Court.

IT IS SO ORDERED.

/s/_____
HERMAN J. WEBER, SENIOR JUDGE
UNITED STATES DISTRICT COURT

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Case No. 02-3602

PETER M. HAGAN, JR.	)
Plaintiff-Appellant,	)
	)
v.	)
	)
WARNER/ELEKTRA/ATLANTIC CORPORATION,	)
Defendant-Appellee.	)
	)

PETITION FOR REHEARING AND REHEARING *EN BANC*

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Peter M. Hagan, the Appellant herein, hereby respectfully petitions this Panel for a rehearing as to the decision rendered by it on March 10, 2004 (copy of Panel Decision attached hereto as Attachment A) as well as for a rehearing en banc. The basis for this Petition is as follows:

1. The Panel Decision conflicts with the decisions of the Sixth Circuit Court of Appeals in *Franulic v. Bozell Worldwide*, 2001 U.S. App. LEXIS 27310 (6th Cir. Dec. 21, 2001)[1] *Logan v. Denny's, Inc.*, 259 F. 3d.558 (6th Cir. 2001); *Herendeen v. Michigan State Police*, 39 F. Supp. 2d 899 (W.D. Mich. 1999); *Wexler v. White's Fine Furniture, Inc.*, 317 F. 3d 564 (6th Cir. 2003); *English v. Baptist Healthcare System, Inc.* 2003 U.S. Dist. LEXIS 921 (W.D. Ky. 2003); *Abrams v. Millikin & Fitton Law Firm*, 267 F. Supp. 2d 868 (S.D. Ohio 2003).

Consideration by the full Court is therefore necessary to secure and maintain uniformity of this Circuit's decisions.

2. Consideration by the full Court is also necessary in that the issue of whether an employer's maintenance of race-conscious employment policies, and acting discriminatorily pursuant to those policies, constitutes direct evidence of discrimination has never been addressed by this Court.

3. As to the Petition for Rehearing by the original Panel, Appellant, citing 6 Cir. R. 35(c), respectfully submits that the Circuit Panel erred in its recitation of many key facts of this

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[1] All unpublished cases are included alphabetically in the Attached Appendix of Cases.

case, which caused the Panel to arrive at legal conclusions it otherwise would not have made.

I. The Circuit Panel erred in its failure to find that Appellee WEA engaged in direct reverse race discrimination.

The Circuit Panel misperceives Appellant Hagan's claim. Mr. Hagan has never relied exclusively on WEA's adhering to an affirmative action plan. Rather, the crux of his argument is that WEA embarked on a comprehensive campaign to implement a series of race-conscious hiring and promotion measures, over and above, and independent of, the promulgation of its affirmative action plan. Hagan cited to the Panel a myriad of pronouncements and personnel measures undertaken to increase the number of minorities in management so as to redress their historical underutilization. WEA CEO David Mount's clearly articulated aim of increasing the hire of minorities and his proud citation of WEA's track record under his administration are a matter of record.[2] Hagan also cited pressure placed by WEA's California home office on its Branch Managers throughout the country to track and report back to headquarters the Branch's progress in increasing minority representation. Hagan's supervisor in the Cleveland Branch Office, Richard Froio, frequently reported back to California his anxiety over his inability to achieve the desired results and his resolve to try harder.

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[2] In the interest of brevity, and in order to keep within the 15-page limitation of this Brief, Hagan is unable to cite the Court to relevant excerpts from the record. These citations are fully set forth throughout Hagan's Final Appellate Brief and Final Reply Brief.

Hagan also adduced evidence of a number of quotes of Dave Mount in a trade magazine wherein he voices his intent to maximize the hiring and promotion of minority individuals and females. Finally, Hagan adduced evidence tending to show the pressure imposed by Jesse Jackson and the Rainbow Coalition on WEA and other record companies to hire more African-Americans into management.

Contrary to the assertion of the Circuit Panel, there is precedent within the Sixth Circuit on point in support of Hagan's position. In *Herendeen v. Michigan State Police*, 39 Supp. 2d 899 (W.D. Mich. 1999) the Court cited as direct evidence of discrimination an employer's corporate policies in which managers were required to take race into consideration in making decisions as to who to promote. The Court also cited a goal by the company that it's workforce should reflect the society it serves.

The Circuit Panel took Hagan to task for failing to establish any evidence of a causal connection between "the Plan" and his demotion, (Circuit Panel Decision at 4-5)[3] as if

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[3] The Circuit Panel's use of quote marks around the word "demotion" suggests skepticism that Hagan truly suffered an adverse employment action. However, Hagan has gone to great lengths throughout the briefing process to show that he was truly demoted in terms of job responsibility, even if it did not reflect a diminution in pay and benefits. Whereas before the transition he was the Branch Sales Manager, the top sales executive in the Cleveland office, he was now given the lesser title of Field Sales Manager. His former position was taken over by Dale Hill, who now occupied the top sales executive position as the new Sales Manager out of the Cleveland office. Hill took over all of Hagan's former job functions and job responsibilities. Hagan has taken great pains to adduce evidence that he had suffered a real loss of job

the only way Hagan could prove his case is to introduce testimony that WEA managers stated outright that Hill was given Hagan's job in furtherance of WEA's goal to increase its complement of African-American managers. However, rarely is such evidence offered on a silver platter. That is why the various circuit court decisions cited by both Hagan and the Circuit Panel allow reverse discrimination plaintiffs like Hagan to introduce evidence that the employer's race-conscious hiring and promotion policies actually motivated the at-issue decision. *Bass v. Board of County Commissioners*, 256 F. 3d 1095, (11th Cir. 1999). *Messer v. Meno*, 130 F2d 130, 139 (5th Cir. 1997); *Herendeen*, supra.

Here, Hagan has adduced into the record a significant quantum of evidence that WEA's decision to promote Dale Hill into Hagan's former position of Sales Manager was part and parcel of its race-conscious promotion plan, as opposed to a dispassionate conclusion that Hill was objectively more qualified than Hagan. (1) Hagan was doing a good job. The Cleveland territory which he oversaw was amongst the top performers in terms of sales. (2) Even after the territorial configuration had been decided upon, Rick Froio informed Hagan the job of Cleveland District Sales Manager was his. (3) Hill was demonstrably far less qualified than Hagan. He had had virtually *no* sales experience and *no* managerial experience. (4) Hill's promotion to Cleveland District Manager was a foregone conclusion. He had been hand

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responsibilities in his new subordinate position as Field Sales Manager. He no longer had direct access to the Branch Manager, who now resided in Chicago. Also, he was isolated from direct contact with the Cleveland Branch sales personnel and customers.

picked by WEA's California home office.[4] (5) Hagan had been kept in the dark as to the fact that he now had to compete for his old job. He was not offered the chance to interview for the position, until he learned about the "opening" second-hand and thereafter demanded the opportunity to interview. And even then, his interview was perfunctory. This is precisely the type of evidence that Circuit Court, including the ones whose decisions the Circuit Panel has cited, have viewed as evidence probative of a discriminatory motive to favor minorities over non-minorities. In *Messer*, supra. WEA's motivation in this case is certainly a question of fact. A jury could reasonably conclude from all of the evidence set forth above that WEA's decision to bring in Hill to occupy the top sales position in Cleveland, and demoting Hagan to a position subordinate to Hill, *was at least a motivating factor* in WEA's decision to adhere to its race-conscious policy of promoting the advancement of African-Americans into its management ranks. *Jacklyn v. Schering-Plough Healthcare Products*, 176 F.3d 921, 926 (6th Cir. 1999); WEA's motivation is a jury question, not to be resolved on summary judgment. *Bass*, supra at 1110.

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[4] The Home Office was the decision maker, not Dennis Schone, as the Circuit Panel found. See p.7 *infra*.

II. The Circuit Panel's Conclusion that Appellant Hagan Failed to Adduce Credible Evidence so as to Rebut WEA's Non-discriminatory Reasons for Replacing him with Hill in 1995 and laying him off in 1999 is Contrary to Established United States Supreme Court and Sixth Circuit Precedent.

A. Introduction

Ordinarily, it is unnecessary to dwell on standards a federal court must follow in deciding whether or not to grant summary judgment. The law has been established for years. However, because the Circuit Panel (and the lower court) have failed altogether to apply these standards in this case, Hagan is now compelled to call these standards to the attention of the Court *en banc*, as well as to the Circuit Panel for its reconsideration. The Circuit Panel itself framed the question correctly in its decision. When considering whether the non-moving party has established the existence of a genuine issue of material fact, the Court must examine *de novo* all of the documentary and testimonial evidence the record, drawing in the process *all inferences from the underlying facts in the light most favorable to the non-moving party*. Panel Decision at 3 (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48). This is the law of this Circuit as well. *Smith v. Kentucky State University*, 2003 U.S. App. LEXIS 26702 (6th Cir., Dec. 22, 2003); *Fuhr v. School Dist. Of the City of Hazel Park*, 2004 U.S. App. LEXIS 5449 at *12 (6th Cir., March 24, 2004). This is also the law in Ohio. *Holowell v. Society Bank & Trust*, 78 Ohio App. 3d 574, 578 (1992).[5]

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[5] Ohio law is relevant since many of Hagan's claims are pendant state claims.

B. The 1995 Demotion

The Circuit Panel's analysis of Hagan's 1995 demotion claim runs altogether contrary to these principles. Basically, the Panel cites all of the proffered reasons given by Dennis Schone in support of his belief that Hagan was unworthy to continue as Sales Manager of the Cleveland Office. (Panel Decision at 6). The Court recognized that Hagan had adduced evidence that he "may indeed been a good choice to head the Cleveland office", but the fact that Schone "believed" Hagan was not a good choice carried the day (Panel Decision at 7).

Such reasoning flies in the face of the summary judgment standards outlined above. WEA's motivation was a question of fact. Yet, the Panel has acted as the fact finder by only considering Schone's rationale for demoting Hagan instead of allowing a jury to weigh all of the conflicting evidence. Considering only the facts that favor the moving party allows a Court to find in favor of the movant in an unfair, one-sided analysis. *Erwin v. Potter*, 2003 U.S. App. LEXIS 22806 at * 897-898 (6th Cir., Nov. 4, 2003). But this is precisely what the Panel did: (1) It ignored altogether the record evidence adduced by Hagan that Schone was never the decision maker, but that Hill's promotion to the Cleveland office was foisted on him by WEA's headquarters. Schone had stated to others that Hill had been forced on him, and was Schone's "cross to bear." (2) Assuming that Schone was the decision maker, the Panel ignored altogether the fact Schone could not have been all that fixated on Camelot's unease with Hagan, in that Hill had no sales experience at all. (3) The panel also overlooked the fact that the Nazi costume event took place several months earlier, and that nobody had made an issue of it at the time, and that Hagan had asked his Jewish hostess ahead of time whether she would be offended by the costume. (4) The Panel also overlooked the fact Hagan's

intoxication had taken place several years earlier, while he was going through a divorce, and suffering post-traumatic stress syndrome from his combat duty in Viet Nam. All of these facts create inferences, drawn most favorably for Hagan, whereby a jury could reasonably conclude that Schone's (or WEA's) decision to demote Hagan was a pretext for reverse race discrimination.

Hagan adduced a mountain of additional evidence, altogether ignored by the Panel, which created inferences which the Panel should have drawn in a light most favorable to him: (1) WEA's aforesaid underlying preoccupation with the "under-utilization" of African-Americans in its management ranks; (2) Hagan's clear advantages over Hill in terms of company seniority, sales experience (Hill had none), and executive experience (Hill had none); (3) Hagan's admirable sales record. His Branch was always amongst the leaders in sales. He received accolades, and was once named Field Sales Manager of the Year; (4) Froio's initial assurances to Hagan and one of his co-workers after the 1995 realignment that his current position as Cleveland District Sales Manager, i.e. *the top executive sales position*, was safe; (5) the unprecedented nature of Hill's promotion --- pushed by California headquarters to be leapfrogged over intermediate levels of executive responsibility; and (6) the failure to advise Hagan that his job was up for grabs, or to interview him seriously.

Instead of addressing and considering all of this evidence, the Panel brushed off Hagan's claim of reverse discrimination as "only speculation" (Panel Decision at 8). This conclusion is unwarranted. Hagan has not engaged in speculation. He has adduced an impressive array of evidence which has created strong inferences that, if resolved in his favor, would

certainly allow a jury to reasonably conclude that Hill was chosen to replace him because of his race.

C. The 1999 Reduction in Force

The Panel again takes a one-sided and skewed view of the evidence. As was the case with Schone, it takes Ray Milanese's self-serving testimony at face value that he was familiar with and favorably disposed towards Hill's performance as District Sales Manager, but not Hagan's. That is why he chose Hill and not Hagan for the transfer to Philadelphia when the Cleveland office closed. In so doing, it ignores a substantial body of evidence to the contrary, which, if credited, would allow a reasonable jury to conclude that Milanese knew, or should have known, that Hill was a disaster as Sales Manager, far inferior in terms of performance than Hagan, who had occupied the position for several years prior. Here is the list of the evidence adduced by Hagan, all of which was overlooked by the Panel:

1. Hill was a terrible performer. Numerous employees in the Cleveland office testified in deposition that Hill would curse at them, scream at them, openly referred to his own secretary as a bitch, and assaulted one of his subordinates at a sales meeting.

2. One of the female employees in Cleveland complained to WEA's home office that Dale Hill had harassed her, and threatened to file a lawsuit. Nothing was done to warn or counsel Hill about this.

3. Schone ultimately wrote a lengthy scathing memo to Hill questioning his honesty, competency, and inability to service the customers. It strains credulity that Milanese was not aware of all of this.

4. Milanese in any event later admitted that he was told by outgoing Branch Manager Schone about Hill's shortcomings. He further admitted that he was made aware of the female employee's complaint about Hill's harassment and her threatened lawsuit.

Given all of this evidence, who would be the best candidate for the transfer to Philadelphia? Hill, a poor performer who has a record of dishonesty, crudity, violence, and inability to get along with customers? Or Hagan, his assistant, who competently performed the job of Sales Manager in the past, and who was currently performing in the same Field Sales Manager job for which there was a vacancy in Philadelphia? A jury is certainly capable of reasonably concluding that Hagan was a far better choice than Hill. Giving Hagan the benefit of the doubt, as a court must in the context of a Motion for Summary Judgment, the Panel should have drawn the favorable inference that the only reason Hill was selected for transfer was that he was a minority individual and therefore, in WEA's mind, a sacred cow.

Similarly, Hagan's argument that had he not been unfairly and unlawfully demoted back in 1995 he, not Hill, would have worked closely with Milanese and thus gotten the nod for the Philadelphia vacancy is not "speculation" as the Panel characterizes it. (Panel Decision at 9). Hagan's long track record as an effective Sales Manager and before that as Field Sales Manager, as well as his prior good relationship with Froio and his predecessors creates a inference that he would have gotten along with Milanese as well, another inference which should be resolved in Hagan's favor.

The same argument can be made with regard to WEA's later choice to fill the vacancy with Jeannie White. The Panel overlooked the evidence adduced by Hagan that White had no

sales experience outside the limited genre of Black Music. Hagan, by contrast, had several years of experience as a salesman, Field Sales Manager, and Sales Manager selling *all* types of music. Hagan had more overall seniority in the company than did the far younger minority individual White. A favorable inference can, and should, be drawn that from any objective standpoint, Hagan was a far more suitable candidate than White to fill the vacancy, and indeed would have been awarded the job but for the fact that White was young and African American. The Panel did not even address the Hagan vs. White issue.

The Panel rejected Hagan's argument that he then should have been selected over Mary Ressner to fill the resultant Philadelphia vacancy of Field Sales Manager--Black Music, because Hagan admitted that he neither understood nor enjoyed black music. However, the Panel ignored the fact that Hagan nonetheless had always done well overseeing the selling of black music out of the Cleveland office. The obvious and reasonable inference is that one doesn't have to appreciate or even understand the substance of black music, as long as he has enough marketplace savvy and know-how to sell it. The Panel again refused to draw an inference in favor of Hagan.

The Panel rejects Hagan's claim of bumping rights into the position in Detroit on the basis that WEA managers denied the existence of a bumping policy. (Panel Decision at 10-11). The Panel discounts Hagan's first hand knowledge that a bumping policy existed, labeling it as "his own unsupported claim", notwithstanding the fact that his claim was corroborated by the affidavit of a co-worker. *Id.* Simply put, the Panel looked at factually conflicting evidence as to the existence of a bumping policy, and chose to credit the

testimony of WEA. Again, the Panel has usurped the role of the jury in making credibility resolutions and findings of fact.

Finally, the Panel rejects all of Hagan's 1999 downsizing claims on the basis that "he was offered a higher paying sales job anyway" (Panel Decision at 11). The Panel pulls this finding out of thin air. There is no finding that the sales position that Hagan was offered in 1999 was higher paying. The evidence shows just the opposite, that the compensation Hagan would have made as a territory salesperson was markedly *less* than he had been making as Field Sales Manager. To be sure, the Court could draw an inference that the sales job would have commanded more of a salary than either White or Ressner ended up making in Philadelphia. However, the opposite inference could also be drawn that Hagan would have kept his current higher Cleveland salary had he been transferred to Philadelphia, especially in a lateral move to the same Field Sales Manager position. In fact, when Hagan had been demoted in 1995 from Sales Manager to Field Sales Manager, he was allowed to keep his old salary. So the Panel once more erred in failing to draw the reasonable inference in favor of Hagan that the sales job he was offered was less than what he would have made had he been transferred to Philadelphia. Even were Hagan's salary as a salesperson more than that he would be making as a Field Sales Manager in Philadelphia, the obvious loss of responsibilities would itself constitute an adverse action which would justify his refusal to accept the sales job. *Kocsis v. Multicare Management*, 97 F.3d 876 (6th Cir. 1996); *Abrams v. Millikin & Fitton Law Firm*, 267 F. Supp. 868-874-875 (S.D. Ohio 2003); *English v. Baptist Healthcare System, Inc.*, 2003 U.S. Dist. LEXIS 921 at *10-14 (W.D. Ky. 2003).

III. Conclusion

After reading the Panel Decision, one is left with the impression that the Panel, like the lower court before it, merely lifted from a prior decision the boilerplate language on the standards for granting or denying summary judgment and pasted it into its Panel Decision, without truly reading and applying the principles set forth in that boilerplate. Time and time again throughout its decision, the Panel went out of its way to resolve all credibility resolutions and draw all permissible inferences in favor of the moving party WEA instead of the non-moving party Hagan. In so doing, the Panel turned its back on a solid and long line of Sixth Circuit precedent. One cannot help but think that were Hagan a well-qualified African-American (or female) employee who was suddenly replaced by a markedly less qualified white (or male) employee, and was later passed over for transfer to fill a vacancy in favor of white (or male) employees whose performance was abysmal, or whose experience in the at-issue jobs was minimal or non-existent, all against a backdrop to a self-admitted goal to hire white people whenever possible, this Court would have no problem rejecting the employer's motion for summary judgment, and allowing the alleged victim to have his or her day in court. In fact, this Circuit has disposed of motions on this basis time and time again. See *Franulic v. Bozell Worldwide, Inc.* 2001 U.S. App. LEXIS 27310 at *25-26 (6th Cir. 2001), *Smith* supra at *6; *Fuhr* supra at *12. However, cases where reverse discrimination plaintiffs have survived summary judgment are noticeable by their absence. Hagan, a white reverse discrimination plaintiff, must be given the same benefit of the doubt in terms of credibility resolutions and drawing of inferences as any other Title VII plaintiff at the summary judgment phase of this litigation. This is not to say that Hagan will ultimately prevail were this case to proceed to trial. Each side will be free to present any

evidence it deems persuasive. Suffice it to say however that Mr. Hagan has adduced sufficient direct and circumstantial evidence whereby a jury could reasonably conclude that Hagan was demoted and later denied a transfer because of WEA's race-conscious bias. *Franulic* supra at *26-27. Hagan, too, deserves his day in Court.

For all of these reasons, Hagan respectfully asks this Panel to rehear the case, and reconsider all of his evidence. Barring that, Hagan respectfully requests an en banc rehearing of the entire appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of Plaintiff-Appellant's **Petition For Rehearing And Rehearing *En Banc*** was served by ordinary U.S. Mail on David Skidmore, Esq., Frost, Brown and Todd, 2500 PNC Center, 201 East Fifth Street, Cincinnati, Ohio 45202-4182, on this 7th day of April, 2004.

_____

Donald B. Hordes

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

No. C-1- 00-412

[Filed December 21, 2001]

PETER M. HAGAN,)
Plaintiff,)
)
v.)
)
WARNER/ELEKTRA/)
ATLANTIC CORP.,)
Defendant.)
)

PLAINTIFF'S MEMORANDUM CONTRA DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Defendant's selective citation to limited facts in the vast documentary and testimonial record of this case[1] does not

[1] The parties took 18 depositions in 7 cities across the country, totaling approximately 4000 pages. Over 100 exhibits were introduced by each side.

begin to describe what happened to Plaintiff Peter Hagan at the hands of Defendant Warner/Elektra/Atlantic Corporation (herein "WEA") to further its improper race-biased agenda. Mr. Hagan a 49 year old Caucasian man who gave WEA 21 years of faithful and successful service as a sales executive for WEA. (See EEOC Charges, attached to Plaintiff's Complaint). His career was suddenly undermined in 1995 when he was demoted so that a patently unqualified young African-American male, Dale Hill, could take his place. Hagan's career disintegrated altogether four years later in 1999, when, in the thee of an office closure, he was denied the opportunity to transfer to another management position within the company for which he was clearly qualified, while the same position was offered to the less qualified and less experienced Dale Hill. While federal law allows private employers some leeway in encouraging and fostering the hire and advancement of qualified minorities, it does not allow them to run roughshod over the

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B. Sufficient Evidence has been Adduced Into This Record Whereby a Jury Could Reasonably Conclude that WEA Engaged in Reverse Race Discrimination Against Pete Hagan when, in 1995, it Demoted Him to a Lower Ranking Position and Brought in Dale Hill to Take His Place.

It is well-settled in this circuit as well as in other circuits that a Plaintiff alleging reverse race discdminatiort can prove his case in one of two ways: First, through adducing *direct* evidence of bias by an employer against white employees in favor of minority employees, or, secondly by adducing *circumstantial* evidence which, if credited, would enable the jury to conclude that reverse discrimination has taken place.

Weberg v. Franks, 229 F. 3d 514-522 (6th Cir. 2000) 522-523. *Abeita v. Transamerica Mailings, Inc.,* 159 F. 3d 246, 522-523 (6th Cir. 1998); *Kline v. Tennessee Valley Authority,* 128 F. 3d 337 (6th Cir. 1997). An employer rarely admits up front that it is discriminating in favor of one race or another, thus supplying direct evidence of discrimination. Therefore, in most cases plaintiffs will attempt to prove their cases the second way, through reliance on indirect or circumstantial evidence of discrimination. In these cases, the federal courts invariably resort to the analytical framework set forth in *McDonell Douglas Corp. v. Green,* 411 U.S. 792 (1973). This framework requires a plaintiff to prove a *prima facie* case by meeting various criteria or "prongs". Assuming the plaintiff is successful in proving his *prima facie* case, the Defendant then has the burden of articulating a valid or non-discriminatory basis for the employment decision. Then the burden shifts back to the plaintiff to show that the reasons advanced by defendant are pretextual. *Id.* at 802 et seq.

It is important to note that if a plaintiff is proceeding under the "direct evidence" theory of proving reverse discrimination, he only needs to adduce that evidence, without having to prove a *prima facie* case through the cumbersome formula set forth in *McDonnell Douglas.* It is also important to note that a plaintiff can prove his case either through the direct method, or the circumstantial method. The methods are not mutually exclusive. *(Weberg* at 523).

In this case, Plaintiff has made out a case of reverse racial discrimination under both the direct evidence and circumstantial evidence methods of proof.

1. Direct Method

Peter Hagan adduced sufficient evidence whereby a jury could conclude that race was a direct factor in WEA's decision to demote Pete Hagan out of his position of Cleveland's Branch Sales Manager into a lower level position of Field Sales Manager so that WEA could achieve its overarching goal of promoting more blacks into positions of management and replacing Pete Hagan with Dale Hill. This circuit recently held that "direct evidence is 'that evidence which, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer's decision'." *Weberg supra* at 522; *Jacquelyn v. Schering-Plough Healthcare Prods Sales Corp.*, 176 F. 3d 921,926, (6th Cir. 1999); *Terbovitz v. Fiscal Court of Adair Cty.*, 825 F. 2d 111, 1 15 (6th Cir. 1987). In this case there is an impressive array of evidence which indicates a self avowed intent by WEA to aggressively push African-Americans, equally qualified or not, into higher positions of management. The first indication of this is the Affirmative Action Plan and related documents referenced in the "Factual Background" section supra at 7 through 11.

Plaintiff is well aware that the existence of affirmative action plans does not automatically fulfill the requirement of direct evidence, and has rejected Plaintiff's claims of reverse discrimination based merely on the *existence* of an affirmative action plan and no other circumstantial evidence. *Sampson v. Secretary of Transportation,* 1999 U.S. App. Lexis 14142 (6th Cir. 1999). The affirmative action plans and ancillary documents in this case reflect more than a general well-intentioned purpose of looking out for opportunities where they exist to seek out qualified black applicants, advance qualified minorities into open management positions, or***

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 02-3602

PETER M. HAGAN,
Plaintiff-Appellant,

v.

WARNER/ELEKTRA/ATLANTIC CORPORATION,
Defendant-Appellee.

On Appeal From
The United States District Court
for the Southern District of Ohio
Case No. C-1-00-412

FINAL BRIEF OF PLAINTIFF-APPELLANT,
PETER M. HAGAN, JR.

In Bass v. Board of County Commissioners, 256 F.3d 1095, 1110 (11th Cir. 2001), the Court held that the existence of an affirmative action plan, along with evidence that the plan was followed in an employment decision, even with good intentions,

constitutes direct evidence of unlawful discrimination.[4] *See also* M cGarry v. Board of County Commissioners of Pitkin, 175 F.3d 1193, 1200 (10th Cir. 1999); (hire of minority individuals in pursuit of goals of affirmative action plans, and policy statements made by hiring authorities in support of affirmative action objectives constitute direct evidence of discrimination.); Brown v. McLean, 159 F.3d 898, 904 (4th Cir. 1998); Cerrato v. San Francisco Community College Dist., 26 F.3d 968, 976 (9th Cir. 1994); McQuillen v. Wisconsin Educ. Ass'n Council, 830 F.2d. 659, 666 (7th Cir. 1987) .

In granting summary judgment to WEA, the lower found no direct evidence of reverse discrimination. The lower court noted that WEA had denied acting pursuant to its Affirmative Action Plans in its promotion of Hill over Peter Hagan in 1995 or its choosing Hill and other minority individuals over Mr. Hagan for vacancies in 1999, and that Mr. Hagan had adduced no direct evidence to the contrary. (R. 31 Order, at 24-25, Apx. 46-47).

* * *

[4] WEA has never defended on the basis that its plans were valid. However, in his Memorandum Contra (R. 24), Mr. Hagan cited persuasive case authority that WEA's plans were invalid. *See*, R. 24 at 26-27, Apx. 462-463.

Supreme Court, U.S.
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(2)

No. 04-296

In the Supreme Court of the United States

PETER M. HAGAN,

Petitioner,

v.

WARNER/ELEKTRA/ATLANTIC CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did Petitioner Hagan come forward with sufficient evidence to establish pretext in this discrimination case?

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

The parties to this proceeding are Petitioner Peter M. Hagan and Respondent Warner Elektra Atlantic Corporation.

Respondent Warner Elektra Atlantic Corporation ("WEA") had parent companies of The Warner Music Group, Inc. and AOL Time Warner, Inc. while this case has been pending. WEA's parent company is now WMG Parent Corporation.

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OPINIONS BELOW

Respondent concurs with the statement of the Opinions Below provided by Petitioner.

STATEMENT OF JURISDICTION

Respondent concurs with the Statement of Jurisdiction provided by Petitioner.

STATUTORY PROVISIONS INVOLVED

In addition to the statutory provisions provided by Petitioner, Respondent references the following statutory provisions in its Brief in Opposition.

Ohio Revised Code § 4112.02(A) (2004):

> It shall be an unlawful discriminatory practice for any employer, because of race, color, religion, sex, national origin, disability, age, or ancestry of any person, to discharge without just cause, to refuse to hire, or otherwise to discriminate against that person with respect to hire, tenure, terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment.

Ohio Revised Code § 4112.99 (2004):

> Whoever violates this chapter is subject to a civil action for damages, injunctive relief, or any other appropriate relief.

INTRODUCTION

Petitioner Hagan alleged that his employer, WEA, intentionally discriminated against him. In an unpublished, unanimous decision, the Sixth Circuit affirmed the District Court's grant of summary judgment in this case. The Sixth Circuit held that no reasonable jury could determine that Petitioner Hagan could establish pretext in this discrimination case. Not a single judge within the Sixth Circuit requested a vote on Hagan's motion for en banc review. (Petition, Apx. 1a-1aa).

This Court should not accept certiorari in this case because: (1) the Sixth Circuit's decision is unpublished and therefore not precedent; (2) Hagan waived the second issue he presents for review; (3) a substantial portion of this case (Hagan's 1995 claims) deal exclusively with a question of Ohio law; and (4) the circuit courts are uniform, not split, that an affirmative action plan is irrelevant where the challenged decisions were not made pursuant to this plan.

STATEMENT OF THE CASE

Petitioner Hagan previously explained this case contained a "vast documentary and testimonial record." (Petition, Apx. 60a). It is a factually complicated case because Hagan is challenging four employment decisions made by different decisionmakers at his former employer, WEA, a music

distributor.[1] Hagan, a white man, claims that in 1995 and 1999 his white male supervisors discriminated against him because he is white and male.

First, Hagan, claims that Denny Schone, another white man, should have promoted Hagan to run WEA's Cleveland office in 1995. Hagan claims to be the victim of reverse discrimination under Ohio law because Schone selected a black man to run the office.

The evidentiary record demonstrates that Schone did not elevate Hagan into the top position in Cleveland because: (1) WEA's top customer in Cleveland asked that Hagan not be put in charge of the Cleveland office because he had not been visible enough with that customer; (2) Schone questioned Hagan's judgment after Hagan dressed up as Adolf Hitler at a WEA customer event; (3) the outgoing head of WEA's Cleveland office recommended against Hagan; and (4) Hagan

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[1] Like his filings in the lower courts, Hagan's Petition contains statements that are either incorrect, overstated, or not supported by the record. (*See* Opposition, Apx. 80a). For instance, citing a single newspaper article that does not even mention WEA, Hagan writes: "WEA and other record companies were also under intense public pressure from Jesse Jackson and the Rainbow Coalition to hire more minority individuals into management." (Petition, 4). In reality, none of the decisionmakers in this case had seen this newspaper article or heard about its subject matter. (Schone Dep., Opposition, Apx. 34a-35a); (Milanese Dep., Opposition, Apx. 61a-63a).

never expressed real interest in the job.[2] (Petition, Apx. 7a). In sum, even Hagan admits that his claim regarding the 1995 decision is based upon "total" speculation. (Hagan Dep., Opposition Apx. 18a-19a). Viewing this evidence, the Sixth Circuit found no evidence of pretext.

Four years later, WEA decided to close its Cleveland office. Unlike the great majority of Cleveland employees who lost their job in this reduction-in-force, Hagan received an offer of continued employment. Despite this offer, Hagan believes that he was targeted for removal from WEA. (Hagan Dep., Opposition Apx. 6a-9a). He admits, however, that he does not know if he was targeted based upon his race or sex. (*Id.*)

Specifically, Hagan's claim is that WEA discriminated against him by not offering him three other positions in other cities. Hagan never applied to the decisionmaker for these positions. (Milanese Dep., Opposition Apx. 51a-53a); (Hagan Dep., Opposition Apx. 9a-11a); (Costello Dep., Opposition Apx. 40a-43a). The positions were either occupied by or awarded to employees who had a close,

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[2] Hagan writes in his Petition that he has performed "very well." (Petition, 5). The record evidence simply does not support this statement. (Schone Dep., Opposition, Apx. 25a-29a, 31a-32a); (Schone Decl. ¶ 2, Opposition, Apx. 106a); (Froio Dep., Opposition, Apx. 66a-72a). In contrast, Hill had exhibited a passion for the job, had passed up a number of other promising opportunities to pursue the job in Cleveland, and had a college degree which Schone considered a plus. (Schone Dep., Opposition, Apx. 23a-25a, 29a-31a).

working relationship with the decisionmakers.[3] (Milanese Dep., Opposition Apx. 48a-60a, 64a-65a); (Hagan Dep., Opposition Apx. 11a-13a); (Costello Dep., Opposition Apx. 41a-43a). In contrast, the decisionmakers barely knew Hagan. (*Id.*)

Furthermore, Hagan admitted at deposition that he lacked the fundamental qualifications to perform two of the three positions at issue. (Hagan Dep., Opposition Apx. 13a-18a). In addition, the positions that Hagan is now claiming he should have received actually paid less than the jobs that were offered to him after the closing of the Cleveland office. (Petition, Apx. 41a). Consequently, the District Court and the Sixth Circuit concluded that there was not sufficient evidence for Hagan to prove intentional discrimination.

REASONS FOR DENYING THE PETITION

I. The Sixth Circuit's Decision In This Case Is Unpublished And Therefore Has No Precedential Value.

Hagan is challenging an unpublished Sixth Circuit decision that has no precedential value. *See Manufacturers' Indus. Relations Ass'n v. East Akron Casting Co.*, 58 F.2d 204, 208 (6th Cir. 1995). Even if the decision were otherwise appropriate for review, it is not binding authority on any future court and cannot create a split in the circuits.

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[3] Hagan writes in his Petition that Hill performed "very poorly in his job." (Petition, 3). While Hagan and his friends did not like Hill, this was not the perception of the person who mattered, Hill's supervisor, who "thought the world of Dale Hill." (Milanese Dep., Opposition Apx. 49a-50a).

II. Petitioner Waived The Second Issue Presented To This Court.

Hagan asks this Court to consider the appropriate standards lower courts should use in determining whether affirmative action plans are valid. (Petition, i). Hagan never directly addressed this issue before the Sixth Circuit, and consequently the Sixth Circuit never had the opportunity to rule upon it. (Opposition, Apx. 102a). Consequently, this issue has been waived. *Husty v. U.S.*, 282 U.S. 694 (1931).

III. This Case Does Not Warrant Review Because A Central Claim In The Case Arises Under Ohio Law.

Hagan conceded in the District Court that he had not met Title VII's statute of limitations to challenge WEA's 1995 decision. (Opposition, Apx. 105a). Hagan's discrimination claim challenging WEA's decision in 1995 is based solely upon the Ohio Civil Rights Act, § 4112. While Ohio law looks to federal law for guidance in discrimination cases, disposition of Hagan's 1995 claims ultimately rests upon Ohio law. This Court should not pursue review where resolution of a substantial portion of the case involves the application of the law of a single state. *See Murdock v. Memphis,* 87 U.S. 590, 626 (1875) ("the state courts are the appropriate tribunals, as this court has repeatedly held, for the decisions of questions arising under the local law, whether statutory or otherwise.").

IV. The Sixth Circuit's Unpublished Decision Is Correct And Reflects Uniformity In The Circuits, Not A Split.

Hagan bases his entire Petition upon WEA's affirmative action plan. In his Petition, Hagan implies that WEA, on its own initiative, adopted an affirmative action plan for some sort of nefarious reason. (Petition, 4, 7). Hagan argues to this Court that because WEA has an affirmative action plan, this constitutes pretext, and a jury should decide his claim of reverse discrimination. (Petition, 9) ("an AAP is evidence of reverse discrimination.").

Hagan fails to reveal two critical facts with respect to this affirmative action plan: (1) WEA was required to have an affirmative action plan by government regulation; and (2) the undisputed evidence is that the decisions impacting Hagan were not taken pursuant to the affirmative action plan.

A. WEA Is Required By Federal Law To Have An Affirmative Action Plan And, Thus, No Discrimination Is Shown.

The simple fact of the matter is that WEA is required to have affirmative action plan. As a government contractor with more than $50,000 worth of contracts, Executive Order § 11246 and the OFCCP require WEA to have a written affirmative action plan. 41 C.F.R. § 60-2.1(b)(1)(i); (Arnold Dep., Opposition, Apx. 44a-46a); (Hagan Dep., Opposition, Apx. 4-6a).

Merely having an affirmative action plan is not evidence of illegal discrimination. *See Denney v. City of Albany*, 247 F.3d 1172, 1188 (11th Cir. 2001) ("[c]ourts have been extremely wary of citing lawful affirmative action plans as

evidence of an employer's pretext"); *Cerrato v. San Francisco Community College Dist.*, 26 F.3d 968, 976 (9th Cir. 1994) (mere fact of an affirmative action plan's existence is not evidence of discrimination); *Christensen v. Equitable Life*, 767 F.2d 340, 343 (7th Cir. 1985) (same), *cert. denied*, 474 U.S. 1102 (1986). Hagan conceded the validity of this legal maxim in the District Court. (Petition, Apx. 63a) ("Plaintiff is well aware that the *existence* of affirmative action plans does not automatically fulfill the requirement of direct evidence, and has rejected Plaintiff's claims of reverse discrimination based merely on the existence of an affirmative action plan and no other circumstantial evidence.") (emphasis in original).

This is particularly true where, as here, the federal government required WEA to maintain the affirmative action plan. *See Reed v. Agilent Technologies*, Inc., 174 F. Supp. 2d 176, 185 (D. Del. 2001) (government contractor's monitoring of compliance with minimum utilization expectations set by the federal government is not evidence of discrimination). Indeed, if the law were otherwise, then every time a white or male employee were disappointed in an employment decision made by a government contractor, then there would automatically be sufficient evidence to establish pretext and force a jury trial.

To support his claim that WEA's affirmative action plan is somehow evidence of discrimination, Hagan notes that WEA's plan uses the term "'under-utilization' (WEA's words)." (Petition, 4). In fact, it is federal regulation (the OFCCP's words) that requires WEA affirmative action plan to address "underutilization." 41 C.F.R. § 60-2.10(a)(1), (3); 41 C.F.R. § 60-2.16. Discrimination is not shown where a government contractor like WEA "track[s] its compliance with the minimum utilization expectations established by the

federal government." *Reed*, 174 F. Supp. 2d at 185. Thus, the fact that WEA had an affirmative action plan is evidence that WEA complied with mandatory federal regulation, not that it was engaged in intentional discrimination.

B. There Is No Split In The Circuits On The Issues Before The Court.

In an effort to create a supposed split in the circuits, Hagan misleadingly states that "[a] number of Courts of Appeal have looked upon AAP's and their race-conscious enabling measures as relevant to the question of whether a race discrimination plaintiff has succeeded in meeting this burden of establishing pretext." (Petition, 10). In each of these cases, there was evidence that the decision was made pursuant to an affirmative action plan or that race was a factor in the challenged decision. *See, e.g., Bass v. Bd. of County Commr's Orange County, Fla.*, 256 F.3d 1095, 1110 (11th Cir. 2001), *reh'g en banc denied*, 273 F.3d 1117 (11th Cir. 2001) ("[t]he existence of an affirmative action plan, when combined with evidence that the plan was followed in an employment decision, is sufficient to constitute direct evidence of unlawful discrimination unless the plan is valid") (emphasis added); *Schurr v. Resorts Int'l Hotel, Inc.*, 196 F.3d 486, 490 (3d Cir. 1999) (employment decision made pursuant to affirmative action plan); *Messer v. Meno*, 130 F.3d 130, 137-39 (5th Cir. 1997), *cert. denied*, 525 U.S. 1067 (1999) (public employer, among other things, directed plaintiff to "hire a Hispanic," and employees were told "it is not required that the most qualified applicant be hired, only that the person hired meet the minimum qualifications set for the position"); *Taxman v. Board of Educ. of the Township of* Piscataway, 91 F.3d 1547, 1551 (3d Cir. 1996), *cert. dismissed*, 522 U.S. 1010 (1997) (plaintiff laid off in order to promote diversity under an affirmative action plan); *Stock v.*

Univ. Foods Corp., 1994 U.S. App. LEXIS 771 (4th Cir. Jan. 19, 1994), *cert. denied*, 513 U.S. 813 (1994) (decision made under affirmative action plan); *Cunico v. Pueblo Sch. Dist No. 60*, 917 F.2d 431, 441 (10th Cir. 1990) (position was "earmarked" for a black candidate).

The cases cited by Hagan are simply not applicable to the case at bar because the undisputed evidence in this case demonstrates that the employment decisions impacting Hagan were not made pursuant to an affirmative action plan. (Schone Dep., Opposition, Apx. 20a-22a, 32a-33a); (Milanese Dep., Opposition, Apx. 58a-62a); (Costello Dep., Opposition, Apx. 38a-40a). Race played no role whatsoever in the challenged decisions. (Schone Dep., Opposition Apx. 32a-33a); (Milanese Dep., Opposition, Apx 59a-61a). The decisionmakers simply sought out the most qualified employees, period. (Schone Dep., Opposition, Apx. 32a-33a); (Milanese Dep., Opposition, Apx. 60a-61a). In response, Hagan could only muster, in his words, "total" speculation. (Hagan Dep., Opposition Apx. 6a-8a, 18a-19a).

The federal courts are uniform in holding that where, as here, the evidence demonstrates that an affirmative action plan played no part in the challenged decision, that plan is irrelevant to claims of discrimination. The Ninth Circuit summarized: "[o]ther circuits have held – and common sense tells us – that the mere fact of an affirmative action plan's existence is not relevant to proving discrimination unless the employer acted pursuant to the plan." *Cerrato v. San Francisco Community College*, 26 F.3d 968, 976 (9th Cir. 1994); *see also Denney v. City of Albany*, 247 F.3d 1172, 1188 (11th Cir. 2001); *Sampson v. Secretary of Transportation*, 1999 U.S. App. LEXIS 14142, at *6-7 (6th Cir. June 23, 1999). In this case, the Sixth Circuit looked to these "sister circuits" for guidance and found, like those other

circuits, that an affirmative action plan is irrelevant unless there is evidence that the employer acted pursuant to that plan. (Petition, Apx. 6a).

Moreover, the facts of the present case stand in stark contrast to those cited by Hagan. In this case, the CEO of WEA articulated that the Company's "goal" was to have the best workforce possible and to ensure that the "best qualified" people got the jobs without any type of discrimination. (Mount Dep., Opposition, Apx. 73a-79a). That goal is clearly stated in the preamble to WEA's affirmative action plans. (Arnold Dep. Exh. L, Opposition, Apx. 96a-99a). WEA's affirmative action plan repeats that it is "the Company's policy and practices to make all employment decisions without discrimination. . .." (*Id.*) Hagan, himself, acknowledged that he was told WEA's affirmative action plan prevented WEA from making employment decisions because someone was – or was not – a minority. (Hagan Dep. Opposition Apx 5a-6a).

The evidence in this case demonstrates that WEA decided against Hagan for certain positions for a variety of reasons – including the request of a major customer that Hagan not run WEA's Cleveland office because Hagan had not been visible with that customer and the fact that the decisionmakers concluded that Hagan had shown poor judgment by dressing up like Adolf Hitler – but none of these reasons have anything to do with the fact that Hagan is white or a man. Unlike the plaintiffs in the cases that he cites, Hagan has never pointed to any evidence in the record that the decisions impacting him had anything to do with WEA's affirmative action plan.

Hagan claims in his Petition there is an "open question" of whether a reverse discrimination plaintiff can prove "causation" through "indirect or circumstantial" evidence.

(Petition, 11). This question is not an open one under federal law. The simple answer to this question is "yes," but Hagan has never pointed to the "indirect or circumstantial" evidence sufficient to raise a genuine issue of material fact concerning pretext.

Consequently, the District Court and a unanimous Sixth Circuit panel examined the evidence in this case and determined that no reasonable jury could decide that the reasons for WEA's decisions were a pretext for intentional discrimination. As the Sixth Circuit concluded, Hagan's claim of a causal connection between the affirmative action plan and the challenged decisions is based solely on his own "unsupported statement." (Petition, Apx. 6a). Hagan would now have this Court reexamine the "vast documentary and testimonial record" and come to a different conclusion than the District Court and the Sixth Circuit on the ultimate issue of pretext.[4] At bottom, Hagan's Petition is a veiled request that this Court reexamine the settled standards governing the evaluation of motions for summary judgment. Those standards need no further review.

C. Petitioner's Arguments About Validity Are Both Irrelevant And Wrong.

Hagan also argues about the validity of WEA's affirmative action plan. Even if Hagan had not waived this issue, he still would not prevail. The federal courts have determined that the validity of an affirmative action plan is not an issue unless there is evidence that the affirmative action plan played a role

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[4] Moreover, the District Court also found faults in Hagan's attempts to establish a *prima facie* case. (Petition, Apx. 36a, 37a, 41a). The Sixth Circuit based its ruling simply upon the issue of pretext. Thus, there is an independent ground to support the decision below.

in the challenged decision. *See, e.g., Brown v. McLean*, 159 F.3d 898, 904 (4th Cir. 1998), *cert. denied*, 526 U.S. 1099 (1999) (no need to determine validity of an affirmative action plan unless the employment decision is made pursuant to the plan); *McQuillen v. Wisconsin Educ. Assoc. Council*, 830 F.3d 659, 666 (7th Cir. 1987), *cert. denied*, 485 U.S. 914 (1988) (same).

Petitioner's heavy reliance upon Third Circuit's decision in *Taxman* is misplaced. 91 F.3d at 1547. In *Taxman*, a public employer laid off a white employee pursuant to its affirmative action plan in an effort to promote racial diversity. *Id.* These are just not the facts before this Court. In this case, the undisputed evidence is that the decisionmakers selected the most qualified candidate for this position, regardless of race or sex. (Schone Dep., Opposition, Apx. 32a-33a); (Milanese Dep., Opposition, Apx. 60a-61a). As the circuit courts have uniformly decided, the validity or invalidity of WEA's affirmative action plan is irrelevant because the decisions Hagan is challenging were not made pursuant to the affirmative action plan.

Even assuming, *arguendo*, that the validity of WEA's affirmative action plan were properly at issue in this case, it is Hagan's burden to establish that WEA's affirmative action plan is invalid. *See Johnson v. Transp. Agency, Santa Clara County, Calif.*, 480 U.S. 616, 626-27 (1987). Hagan has not met this burden. Federal regulation requires WEA to have a plan as a government contractor. Moreover, WEA's affirmative action plan forbids discrimination based upon protected categories, such as race and sex. (Arnold Dep. Exh. L, Opposition Apx. 96a-99a). WEA's affirmative action plan is patterned on the guidelines established for government contractors and is updated annually – that is all that is

required. 41 C.F.R. § 60-2.1(c). There is simply nothing here to merit Supreme Court review.

CONCLUSION

Boiled down, this is a garden-variety discrimination case where the Plaintiff did not establish pretext under Ohio law for the 1995 claims and under Title VII and Ohio law for the 1999 claims. No compelling reason exists for this Court to grant certiorari in this case.

Respectfully submitted,

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APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

No. C-1-00-412

[May 30, 2001]

PETER M. HAGAN,
Plaintiff,

v.

WARNER/ELEKTRA/ATLANTIC CORP.,
Defendant.

EXCERPTS DEPOSITION OF
PETER M. HAGAN, JR.

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before Freddie left but I'm thinking it might have been -- might have been 1991. Don't hold me to it. I think it could have been but I don't recall.

Q. When Rick Froio comes in, he becomes -- well, let me keep going. Let me keep going on your -- how long did you have the field sales manager position, from 1986 until when?

A. Field sales manager till 1989, I believe.

Q. In 1989 you become the sales manager?

A. That's correct.

Q. And in that job you were the number two person in the office?

A. Correct.

Q. How long did you have the sales manager position?

A. I had that until I was demoted in 1995.

Q. You had the sales manager position in '89, Rick Froio comes in sometime in the early 1990s, correct?

A. That's correct.

Q. And he is your boss?

A. He is going to be my boss when Freddie retires, that's correct.

Q. He then becomes your boss?

A. Yes.

* * *

[p.140]

the sales manager?

A. My duties as a sales manager were to direct all aspects of sales for the Cleveland market, which was Cleveland, Pittsburgh, a -- Buffalo, Rochester, New York and some parts of West Virginia. And my main job was making sure that we hit our goals as far as performance of sales that we were given by WEA home office.

I was in charge of the day-to-day dealings with the salesmen. I had -- I was in charge of day-to-day dealings with -- at that time we didn't have field sales managers. Later we did. Okay. With the salesmen. I was responsible for direct relationships with the customers going out to the accounts with the salesmen on a frequent basis, knowing the accounts, working with them, setting up promotions, setting up advertising. All advertising was handled by me. And that's kind of a thumbnail sketch of the main areas that a sales manager would have been responsible for.

Q. In 1995, you become a field sales manager. What were your responsibilities from 1995 to 1999 as field sales manager?

A. I was responsible for -- directly, I had the PDRs, product development reps, reported directly to me. They were a marketing arm for each one of the labels. They

* * *

[p.181]

Q. When did you get this document?

A. Pardon?

Q. When did you get this document?

A. I don't have a date. There was no date on this and I couldn't tell you the exact date of it. It was just one of the times someone showed up to present a presentation to us.

Q. Let's go back to Defendant's Exhibit 30. Did I -- as I recall, you cannot put a time table on when you received Defendant's Exhibit 30?

A. No. I didn't write a date on either one of these so -- and I couldn't tell you -- they possibly could have been at the same time. I really don't know.

Q. Was it your understanding that WEA had an equal employment opportunity policy?

A. Yes.

Q. And that that policy forbade discrimination?

A. As far as I knew, the way they explained it to me, yes, it did.

Q. Do you know whether WEA had -- has an affirmative action policy, a program?

A. I assume they do.

MR. HORDES: Objection. That calls for a legal conclusion as to what affirmative action is. You can [p.182] answer.

Q. What makes you assume they have an affirmative action policy or program?

A. I think every major corporation in the United States has to have one. I mean, it's my understanding of it.

Q. What's your understanding of what WEA's affirmative action policy or program is?

A. I don't think I've ever been given a in-depth analysis of what their policy is enough to be able to quote it chapter and verse. I mean, it is -- they're just are supposed to follow the rules, the guidelines set down by the government.

Q. Have you been told anything about it?

A. They went over some things in different meetings.

Q. Can you recall anything? I'm just asking you to the best of your memory.

A. I'm sure there were things that were -- I can't recall specifically but I know there were things that you -- they wanted you to do and not do. You couldn't tell someone that they couldn't apply for a job because they were a minority or you -- on the other hand, you couldn't tell them they couldn't apply for a job because they were not a [p.183] minority. Either way. You had to basically, I think, my premise of

theirs is to keep everyone on the same playing field type of an analogy.

Q. Do you remember anything else about the -- what you were told about either WEA's equal employment opportunity policy or their affirmative action policy?

A. Not specifically. Again, in generality I remember is to keep everyone under the same playing field. Again, they came in every couple of years and did one of these seminars. It wasn't like we got one every month. It wasn't something that was ongoing structured basis and it all -- it came from California. So it was just enough to know that -- if we had any questions about anything, we were certainly instructed to call Helen or call home office about any problems or areas we may have a question about.

Q. Did you ever call home office or Helen about any questions in this area, or concerns?

A. In affirmative action?

Q. Or EEO policy.

A. I'm not sure. I've talked to Helen about problems with employees. I don't know what the areas of specific area, if it's an EEOC or affirmative action. I've spoken with Helen, as I think I've spoken with Vicki Arnold, too.

* * *

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given opportunities to bump people under them to remain employed.

Q. Anything else?

A. I think those are the key facts. There may be something else. Right now at this time that's what I can remember.

Q. What about you -- who at WEA do you think discriminated against you?

A. I have no way of knowing who at WEA. I don't think anyone raised their hand and said, Pete, I'm going to discriminate against you. Obviously someone did. There was some plan somewhere but I don't have any idea who that individual may be.

Q. What makes you -- what about you, Mr. Hagan, do you think that this unnamed corporate person or persons at WEA, upon what basis do you think they discriminated against you, Pete Hagan?

A. I think I just said that, didn't I?

Q. No, I'm not asking for the reasons. What about you, Mr. Hagan --

A. I don't know --

Q. -- do you think they're targeting?

A. I don't know who did it so how could I know what it was about me that would make them do it.

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Q. Do you think they were targeting your race?

A. I don't know what they were doing.

Q. Do you think they were targeting your sex?

A. I've answered I do not have a clue.

Q. Do you think they were targeting your age?

A. I don't know.

MR. HORDES: Objection.

A. I was never given a reason, a specific reason as to why I was being demoted.

Q. In 1995?

A. In 1995.

Q. Were you ever given a reason why you did not have the opportunity to interview for the -- for a position in Philadelphia?

A. No, I was not.

Q. Did you ever ask?

A. Ask what?

Q. Why you were not given the opportunity to interview for a position in Philadelphia?

A. The jobs in Philadelphia were already awarded to the other two individuals three days before they told us that the Cleveland office was being closed. They had already filled those jobs.

Q. So Jeannie White and Mary Ressner were in their

* * *

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A. He started talking about relocating, about moving. And he -- actually, I think he brought it up about, you know, would I -- what would I think about relocating, what would I think, something to that effect. And that's when I told him that.

Q. Was this at the -- after Pat Borrell had left her job?

A. Pat Borrell?

Q. Who was in the position that -- what position did Sue Costello get?

A. She was formerly was the field sales manager.

Q. Who was in that position before Sue Costello?

A. I don't know. I think Sue Costello had been a field sales manager there for several years. I don't know who she replaced. I would not know. I don't think I know. She had been there for several years. Pat Percell.

Q. Pat Percell? What was her position at WEA?

A. His position.

Q. His position, sorry.

A. Pat Percell, the name -- I mean, I know him -- something, oh, I think he was the -- I think he was the sales manager and --

Q. And then Pat Percell left --

A. -- Sue took his --

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MR. HORDES : Hold on, let him finish the question.

Q. Pat Percell left, correct?

A. That's what I'm thinking I remember, yes.

Q. And there was a vacancy in the sales manager position for months and months in Philadelphia, correct?

A. The vacancy I remember that was for months and months was the vacancy after Sue Costello took Pat Percell's position and when they gave the position to Jeannie White. That's the vacancy I remember that was a long vacancy. That was several months. I don't know what the time frame between Pat Percell leaving and Sue Costello being given the position. I don't remember.

Q. All right. When did you tell Dale Hill you might be interested in the field sales manager Philadelphia position?

A. When it was announced after we found out about it, and I don't know the exact date but we were talking about it in Cleveland. He just said something about it and I said, you know, well, if they're doing interviews and that, I said, I wouldn't mind interviewing for that. Because I thought it might be good to get away from Cleveland and get a breath of fresh air and whatever. I said, if Ray asks or whatever, let him know I would be [p.218] interested.

Q. What did Hill say in response?

A. He said, okay.

Q. Did you contact Ray Milanese about that position?

A. No, I did not.

Q. Why not?

A. Dale Hill had a policy, unwritten, that he did not want the -- me in particular, but any other managers or whatever, myself and -- I don't know if it was Patti Fullard, but he did not want me talking directly to either Denny Schone or Ray Milanese. If I made any effort at all to contact them directly, I got blasted for it. And I felt I wanted my job more than getting fired because Dale Hill got mad at me because I talked to a branch manager. So I just decided the prudent thing to do was do what he said and that's what I did.

Q. So your contact -- when you were working under Dale Hill, your primary contact was -- the person you reported to, the person you dealt with on a regular basis was Dale Hill, correct?

A. Exactly, that was it.

Q. And Dale Hill, his report was Denny Schone and then Ray Milanese?

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A. Correct.

Q. And Dale Hill interacted much more frequently with Denny Schone and Ray Milanese than you did?

A. Correct.

Q. And when Hill was reporting to Ray Milanese, you would see Hill and Milanese meeting a lot, having meetings where you were not included, correct?

A. Correct.

Q. And those meetings would last much longer than Milanese's meetings with you?

A. I don't know if Ray ever had an actual one-on-one meeting with me that I remember. He would have -- if he had one-on-one meetings he would have them with Dale. He may call the other managers in after they discussed what whatever they were discussing, into Dale's office and talk to us maybe as a group or something. That was usually the way it went.

Q. So you really didn't have a lot of one-on-one interaction with Ray Milanese, correct?

A. No.

Q. Correct?

A. Correct, yes, correct.

Q. I wanted to make sure.

A. Yes.

* * *

[p.236]

their job qualification was pretty broad based and whatever. But knew the music or seemed to be able to work well with people, seemed to get along with the accounts, have some type of a relationship with the accounts. She was working for in Detroit when I went over and interviewed her for the job in that. Those are some of the things I looked at. Also the recommendation of people in the office that had been working with her.

Q. And the field sales manager black music position is a different type of position, correct?

A. Yes, it is.

Q. And it's a different type of position because you're interacting with a lot of independently owned and operated small businesses, correct?

A. Correct.

Q. That are quite often located in urban areas?

A. Correct.

Q. And do you think you need a strong knowledge of black culture to do that position well?

A. Not black culture as much as black music and what's going on with black music. I mean, we don't sell their culture, we sell their music. We sell the things that -- you know, we have to know what they're listening to and what their tastes in music are and where they buy their

* * *

[p.376]

A. I don't think she ever came and really invited me to go on sales calls with her. And her thing was -- if she went on sales calls, she would either go with the salesmen or she would go with her PDRs to their little independent accounts or whatever. For the most part, they didn't buy direct. And I would go on sales calls with Patti to go to Camelot or National Record Mart or Arrow or some of the larger accounts and whatever. But that we would go together. But, you know, we did that -- that was the most that we did calls together. We would go to those larger accounts and sometimes go out of town and -- like meetings with accounts and whatever that -- customer meetings and whatever together. As a group, too, it would be more than Patti. Sometimes it would be Patti and several managers.

Q. Right. But the position of field sales manager black music was primarily designed to service the small independent accounts?

A. That was the original thrust of it, correct.

Q. And that was true up until the time you left WEA, correct?

A. It was -- that was still really the thrust of what they were doing. They did try to get into the chain stores wherever possible and whatever, but their day-to-day dealings were primarily with the small independent [p.377] retailers.

Q. And that is a different type of account -- the black music accounts are a different type of account than the other WEA accounts?

A. Well, all small retail accounts are almost the same. They're all struggle, they all have their own type of problems. If it's black music, if it's a country music store or a classical store, they all have some commonalities about them that they're problems. And black music stores seem -- you know, they all have problems. Black -- doesn't matter what genre of music they're in. Any small retailer has problems.

Q. But that's a different type of business, right?

A. A little bit, yes. Because of the nature of the business. It's a very fast moving business. It's a -- again, there are trends with -- something's hot in a black music arena, it can be very hot and it can die very quickly and something else can take its place very quickly. It's a little faster moving as far as the shelf life of the product you're dealing with or whatever.

Q. And that was different than the area of music that you spent most of your efforts on, right?

A. It was a little quicker. It wasn't different. The same premise works on no matter what you sell. We [p.378] always looked at our product as fresh fruit.

Q. And after Patti Fullard came on in the late 1980s to handle black music, from that point forward, you did not have as much involvement in the black music -- in the selling of black music, correct?

A. That would be correct.

Q. That was left to Patti Fullard?

A. That was her job.

Q. And you would -- you would -- Patti Fullard would -- you would assist Patti Fullard on an account that she worked on if she asked, right?

A. Yes, I would.

Q. But you were not going out volunteering to help Patti Fullard on particular accounts, right?

A. Unless she volunteered that she needed the help. If she gave me indication that she needed the help, then I would. But otherwise, no.

Q. Do you consider yourself to be -- to have an interest in black music?

A. Pardon?

Q. Do you have an interest in black music?

A. I grew up with The Temptations, The Supremes, whatever. I like black music. I don't understand the current rap and ghetto rap and all of that. I don't have an [p.379] interest in that. I enjoy -- I enjoy all good music. I don't care

what type of music it is but I don't understand today's black music.

Q. By using the word "today," you're talking about the music of the 1990s?

A. I'm talking about the stuff in the last couple of years that's came out. It's been a radical change from what used to be soul music and rhythm and blues or whatever. It's been a total change in that.

Q. When did it radically change?

A. I'm guessing, I'm not an expert. To my feelings are, it probably started changing around 19 -- probably around 1994, maybe 5, getting into where it is right now with the hard core rap and what they're into now musically.

Q. And from '94 and '95 forward, you didn't like that type of black music, correct?

A. I did not like to listen to that type of black music. I could not -- it would be like me listening to something in a foreign language.

Q. And I take it that from '94 or '95 forward, you didn't follow black music because you didn't like it?

A. Well, I didn't have the responsibility of sales. I followed it if it were -- if it were mainstream [p.380] hit product or whatever, if we had something that was hot and whatever, I followed that. I didn't follow the breaking developing artist or whatever. But certainly if we had a Missy Elliott that was debuting on the chart at number five on a new release, I'd be aware of that and follow that.

Q. So you would follow the big hits in black music but you wouldn't follow the more minor artists?

A. Correct.

Q. And the more minor artists might be selling at some of the smaller independently owned stores that catered to black customers?

A. That would be correct.

Q. How often, Mr. Hagan, have you in the last, let's say, seven years attended clubs, music clubs that are predominantly attended by black patrons?

A. In the last seven years?

Q. Yes, sir.

A. There were a couple of clubs in the Flats. A friend of mine owned one of the larger ones in the Flats and I went in there a couple of times. But as far as attended -- again, describe what kind of club you want to know if I attended.

Q. A music club that is predominantly attended by black people.

* * *

[p.491]

A. Pardon?

Q. Denny indicated to you on that day the decision had not been made, right?

A. Correct. He wanted me to call him on the following Friday.

Q. Then you write, "they want a black sales manager" ?

A. That's what I had figured out by the time I -- that's when I saw Dale Hill come through the door, I knew exactly what was going on.

Q. How did you know what was going on, Mr. Hagan?

A. Because I knew the company didn't have anyone in management other than field sales manager black music and they were getting all this pressure from Jesse Jackson, NAACP, Al Sharpton, et cetera, and my gut told me that this was going to happen. Just a gut reaction.

Q. So you base that on a gut reaction?

A. Gut reaction. That's all it was.

Q. Speculation at this point, right?

A. Pardon?

Q. Speculation?

A. Yes. Totally.

Q. Then on -- you'd agree with me that the pen on -- and feel free to consult the original which your lawyer

* * *

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

No. C-1-00-412

[October 26, 2001]

PETER M. HAGAN,	)
Plaintiff,	)
	)
v.	)
	)
WARNER/ELEKTRA/ATLANTIC CORP.,	)
Defendant.	)
	)

EXCERPTS DEPOSITION OF
DENNY SCHONE

* * *

[p.42]

what's been marked already as Exhibit 30 to the Hagan deposition. I think counsel and I can agree this is what it was. It's entitled Purpose and Policy, Purpose of Affirmative Action Program.

MR. SKIDMORE: Just note for the record, again, this is Mr. Hordes' handwriting of the document.

MR. HORDES: Let me make it easier. I'll mark it as an exhibit.

MR. SKIDMORE: Off the record.

(Discussion had off the record.)

MR. HORDES: Q I'll show it back to you. This is a document that's been marked Defendant's Exhibit 30 in the deposition of Peter Hagan, and it also has a 468 on the bottom page. It's a two-page document, pages 468 and 469 on the bottom.

A 468 and -- Is this a copy?

MR. SKIDMORE: You've handed us two copies of it, Mr. Hordes. He's asking you about the first two pages.

MR. HORDES Let me have the other one back.

MR. SKIDMORE: The question simply is, have you ever seen this before?

THE WITNESS: Yes.

MR. HORDES: Q When did you first see this?

A Yesterday.

[p.43]

Q Okay. You never received this from Helen Zollberger or anyone else from home office?

A Not to my recollection, no. And to be quite honest, in looking at the address on here I wouldn't know why I would because this is for Chatsworth, California.

Q What makes you think -- Where it does say Chatsworth, California?

A Third sentence, first page.

Q Do you know whether WEA ever had an office in Chatsworth, California.

A I believe we did, yes.

I'd like to take a break.

(Break taken.)

MR. SKIDMORE: Mr. Schone is going to assume that if you ask him if he's seen a document, that excludes what he saw in the preparation session.

MR. HORDES: Correct. I'm interested in back when all these facts were coming together, back prior to when this litigation started.

THE WITNESS: Based upon what David just said, obviously my answer to that question would be no.

MR. SKIDMORE: That's in reference to Defendant's Exhibit 30.

* * *

[p.70]

Q Yes.

A As in a formal training program?

Q Yes.

A No.

Q Are you aware that there are written job descriptions for the position of sales manager?

A Yes, I am.

Q Is that something that you developed or does that come out of the home office?

A It comes from home office.

Q To your knowledge, is there a requirement that a sales manager have a college degree?

MR. SKIDMORE: A requirement?

MR. HORDES: Right.

THE WITNESS: No.

MR. HORDES: Q Are you aware that a college degree is deemed desirable for a sales manager?

A Deemed desirable by who?

Q By the home office, if you know?

A Never really -- Don't ever recall ever having a discussion about it.

Q When you were looking for a sales manager, do you deem it desirable that a sales manager have a college degree?

[p.71]

A. Do I deem it desirable?

Q. Yes.

A. It definitely is a plus for that person, yes. I mean, I view that as obviously better educated in a management level. I feel they should be able to handle situations a little bit better to have the background with a college degree.

Q. Do you know whether Tony Niemczyk has a college degree?

A. Yes, he does.

Q. What about Claire Koroly?

A Yes, she does.

Q Was that factor determinative in your decision to hire them?

A I think you have to be a little bit more specific with determinative.

Q If they hadn't had a college degree, would you have hired them?

MR. SKIDMORE: Objection, calls for speculation.

MR. HORDES: You can answer.

MR. SKIDMORE: Objection, hypothetical.

MR. HORDES: Q Well, you hired these people and I think you indicated a while back all the different factors that you look at, that you were impressed with

* * *

[p.86]

MR. HORDES: I'm just trying to get a general idea so the record is clear as to what types of contact this witness had with Mr. Hagan pre 1995. And I think he's adequately described he called on you as a customer. Another contact is you two guys worked in the same territory and had different accounts.

MR. SKIDMORE: You have not asked whether he expressed opinions?

MR. HORDES: No, not yet.

Q My next question is, again, not counting when you became in charge of Cleveland but up until then, sitting here

today, do you have any idea or opinion as to Mr. Hagan's strengths and weaknesses, if you have an opinion?

A Prior to 1995?

Q Prior to 1995 when you saw him call on accounts when you worked with him as a sales rep.

A Basically felt his job performance was average at best. Not the greatest knowledge of music, but did an okay job, a decent job.

Q And are you describing him as someone who called on you at Swallens or are you describing him as co-sales rep?

A Both.

[p.87]

Q When you say he was -- really didn't know music, what do you mean by that?

A I didn't say he didn't know music.

Q Maybe I didn't get my notes correctly.

A Can she read back the response?

Q He didn't have a great knowledge of music?

A Didn't have the greatest knowledge of music is what I believe I said.

Q Can you give me some examples?

A Not really. If you want a generalization, probably couldn't tell me who the bass player was in Crosby Stills & Nash or something like that. I mean, I guess if I compared his knowledge of music to other sales reps that called on me, he'd probably be below of the norm.

Q Did he present a poor image as a sales rep for WEA when called on you at Swallens?

A No.

Q Was he courteous?

A Yes.

Q Was he timely in responding to your inquiries?

A I believe so, yes.

Q When you were co-sales reps, do you know of any accounts complaining about him?

[p.88]

A Well, they wouldn't be complaining to me anyway.

Q Well, I know that. But did you hear second-hand or third-hand that accounts were unhappy with Pete Hagan?

A That's difficult. No. But I wouldn't really be privy to that information.

Q Okay. If you don't know, you don't know. Do you ever recall Mr. Cox criticizing Mr. Hagan within earshot of you. Either he's telling you he doesn't like something Mr.

Hagan is doing or you overhear him say something bad about Mr. Hagan?

A No. It would be very unprofessional on Mr. Cox's part if he did that.

Q Is your memory exhausted as to Mr. Hagan's strengths and weaknesses?

MR. SKIDMORE: At what point?

MR. HORDES: Q As of the time he was either calling on Swallens or when you and he were co-sales reps. Can you think of anything else other than what you've already told me either pro or con?

A Well, I mean, strengths and weaknesses? Again you know, Pete was, if you want to put it in the category of strengths, was dependable. Made calls on a timely basis. But you know, my feeling was that the job [p.89] effort was adequate, never went to that extra step or next level. Did what needed to be done, but nothing over and above.

Q Did you take the extra step?

A I think I did, yes.

Q Was there -- Were sales representatives ranked in the Cincinnati office depending on the volume of sales generated?

A No.

Q So you don't know whether you had better numbers than he did?

A Well, it's difficult to determine. I can say that I think my numbers were better than his only because my customer base was -- I had bigger accounts than he did.

Q There came a time, obviously, you moved on. You went to Kansas City and Chicago and Pete went his own way. As of the spring of 1995, before we get into that interview process which we'll talk about later with Dale Hill, prior to that time, had you ever been privy to a conversation with Rick Froio in which he told you anything about Pete Hagan?

MR. SKIDMORE: The time frame again on this?

MR. HORDES: Q At any time prior to the spring of

* * *

[p.130]

Q Can you explain what you mean by that?

A Well, he didn't in the interview come right out and get in my face and, you know, say, Denny, I want this job. I know I can do this job. This is the job for me. I'm your man.

MR. SKIDMORE: Let the record reflect the witness was pounding the table.

MR. HORDES: Q You said he didn't give that impression or he did?

A Did not. He didn't come on aggressively. In a very mild mannered way showed that this was definitely something that he was interested in.

Q When he left the room, did you and Mr. Froio talk about him?

A I don't believe so.

Q And did you interview Mr. Hill?

A Yes.

Q Tell us about that interview.

A Came on very sharp, basically was very upbeat, expressed high interest level in the position, gave me a lot of background on himself. And the one thing that I remember specifically, and I don't believe it was during the interview, but after the interview in a follow-up conversation that I had with Dale was I was concerned [p.131] about where his priorities were.

Again, as I stated earlier, he was being talked to by Elektra Records as a national sales director for Elektra Records, Atlantic Records was talking to him about a job, and there was a couple other inquiries about him. And I approached him about the situation. Again, in this business, you really -- as you grow in your career in the record business, at some point you reach a level where you have to decide if you want to work in distribution or you want to work for a label. And when I confronted Dale about that, he was very vocal, very adamant about the fact that, Denny, I want the Cleveland sales managers job. I know I can do the job for you. I'll do a great job for you, and that the other job offers that he had been approached were secondary to this job.

Q Was Dale Hill one of those people, as you later found out, that you had contacted him or he showed independent

interest in talking to you? You talked to Alberti. You weren't able to recall whether this was someone who had shown an independent interest in the job like Mike Barnes did or was someone who we approached like Mr. Orr. Do you know the difference?

A Yes.

* * *

[p.174]

already performed?

MR. SKIDMORE: Objection, asked and answered. You can answer again.

THE WITNESS: I can't recall any, you know, specifics. But again, it was I needed to see him improve in his overall job performance. I'd like to see him be a little bit more aggressive.

MR. HORDES: Q Aggressive in what sense?

A Just an overall attitude, work habits in the job.

Q What did you tell him that he had some problems with his work habits?

A Specific problems, no. Did not identify any specific problems.

Q What work habits did you have in mind when you said he needed to be more aggressive in his work habits?

A I thought he needed to be more proactive, a little bit more visible on the street at the account and customer level, spend a little bit more time with sales reps, and just become more involved in day in and day out sales and marketing functions.

Q Had you been told that he had not been visible on the street before?

A I believe when Mike Barnes -- Yes.

* * *

[p.177]

MR. HORDES Q Originally, you said that you and Mr. Froio together decided to hire Dale Hill?

MR. SKIDMORE: I don't think that's what he said.

MR. HORDES: Q Now you're saying it was your decision. Was it a joint decision?

A It was a joint decision, but the ultimate final decision was mine because I was taking over that marketplace and --

Q Okay.

A It was going to be my responsibility to make sure things got done right.

Q Did Mr. Hill's race play any role in your mind in the decision to offer the job to him as opposed to anybody else?

A No.

Q Did it play even a minor role in your decision to bring Mr. Hill aboard as sales manager?

MR. SKIDMORE: Objection, asked and answered. You can answer again.

THE WITNESS: Repeat the question.

MR. HORDES: Q Did Mr. Hill's race as an African American have even a minor role to play in your decision to bring him aboard as sales manager for the Cleveland district?

[p.178]

A No. My decision was based solely on best person available for the job.

Q Okay. I want to shifted focus now to that period of time after Mr. Hill became the field -- the sales manager. What was the nature of your contact with Mr. Hill? Was it by visits or phone calls or what?

A Both.

Q Did you arrange to meet with him on a pre-arranged periodic basis?

A What do you mean by a --

Q Once a month, once every other month, or once a quarter?

A No. Trips were scheduled when we -- when I -- when actually we both deemed necessary. And obviously in the

beginning, I had to take him around to meet the accounts. So I was there, you know, in the beginning quite a bit.

Q Did there come a point in time in which you started receiving complaints about Dale Hill?

A Complaints from who?

Q Well, let's start with -- That's a fair statement. From the labels.

A From the labels?

MR. SKIDMORE: Is the question has he ever received

* * *

[p.264]

whether you've seen this before. Take your time.

A. Well, by looking at it immediately I don't even recognize this.

MR. SKIDMORE: Do you want him to take time to read it?

A. I've never seen this before in my life.

Q. Do you know who Mr. Carns is?

A. Carns?

Q. Yes, the one who originated that e-mail.

A. You mean Carney?

Q. Carney, excuse me.

A. Yes. He works for us at home office if it's the Kevin Carney I'm thinking of.

Q. But you've never seen that memo before?

A. No.

Q. Did you ever recall throughout your professional career reading magazine articles or listening to television or otherwise learning that civil rights organizations were criticizing the record industry for not having enough blacks in management?

MR. SKIDMORE: I think you already went into this.

MR. HORDES: I don't think I did I went [p.265] into it with other people.

A. Nothing specific, no.

Q. Did you ever hear of the Rainbow Coalition buying stock in record companies?

A. No.

Q. Have you ever heard of anything about the Rainbow Coalition writing the boycotted record companies that didn't hire enough blacks?

A. No.

Q. I'm going to show you what's been marked Plaintiff's Exhibit 40, which was a deposition Exhibit in the Vicki Arnold deposition in California earlier this year. Again, you don't have to read line by line, but do you recognize the document in its entity?

A. Yes, I recognize the document.

Q. You do recognize the document?

A. Well, I mean, I know -- I'm stating that I've seen that this is an affirmative action plan document, right.

Q. Did you know prior to now that WEA had an affirmative action plan in place?

A. Yes.

Q. How did you find out about that?

* * *

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

No. C-1-00-412

[June 6, 2001]

PETER M. HAGAN,
Plaintiff,

v.

WARNER/ELEKTRA/ATLANTIC CORP.,
Defendant.

EXCERPTS DEPOSITION OF
SUSANNE COSTELLO

* * *

[p.7]

Q -- work?

A Yes.

MR. SKIDMORE: Make sure you let him finish his question. I know you know what he's going to ask, but let him finish the answer.

THE WITNESS: Okay.

MR. SKIDMORE: You're doing fine.

BY MR. HORDES:

Q Are you aware, sitting here today, of any concerns raised by any of your superiors at WEA - - and by superiors I mean Mr. Milanese or people higher up then that in the California home office - - about the under representation of blacks and women in WEA's management?

A No.

Q That's never come up before?

A No.

Q Have you ever attended meetings in California, WEA meetings?

A Yes.

Q Were you at a meeting were Dave Mount gave a speech at the 25th Anniversary of WEA?

A I believe I was at the 25th Anniversary

* * *

[p.9]

document before?

A I don't recall.

Q Take your time and read it, if you want.

A I don't recall seeing this.

Q Turn the page to the top of the next page. Do you see Item Five?

A Yes.

Q Do you see where it says: Please view your management backup on minority representation?

A Yes.

Q Have you ever seen any questionnaire that had that question on it before?

A Not that I recall.

Q And you've never seen this particular question?

A Not that I recall.

Q Has Mr. Milanese ever asked you, on his behalf, to do a study of how many blacks and how many women you have in various job categories?

A No.

Q Do you read Billboard Magazine?

A Occasionally.

* * *

[p.16]

opinion of Mr. Hagan?

A No.

Q Did Mr. Schone ever share with you his opinion of Mr. Hagan?

A No.

Q Did Mr. Froio ever share with you his opinion of Mr. Hagan?

A No.

Q Did anybody in WEA management ever share with you their opinions of Mr. Hagan?

A No.

Q As of the time of the closing of the Cleveland office, did you have any opinion, one way or another, as to who would be a better candidate for the Field Sales Manager position in Philadelphia; Hill versus Hagan?

A No.

Q Did Mr. Milanese share with you who he thought would be the better candidate for the position?

MR. SKIDMORE: Between?

MR. HORDES: Hill and Hagan.

THE WITNESS: No.

BY MR. HORDES:

Q Did there come a point in time in which

* * *

[p. 24]

A Yes.

MR. SKIDMORE: Little records with big holes.

BY MR. HORDES:

Q So, you interviewed Ressner, White and Cox. Had you and Mr. Milanese talked about interviewing other people from the Cleveland office besides Dale Hill?

A No.

Q You didn't consider any other people out of Cleveland besides Dale Hill?

MR. SKIDMORE: Objection. That assumes something that's not in evidence. Go ahead.

THE WITNESS: I wasn't in the - - however you just phrased it, I wasn't in that. I did not - - whoever expressed interest in the position, I interviewed. I did not select people to interview.

BY MR. HORDES:

Q Do you know whether people from Cleveland, besides Dale Hill, expressed interest in interviewing for that position?

A No.

Q Did Mr. Milanese indicate to you that [p. 25] there were some other people in Cleveland, besides Dale Hill, that might be interested in that position?

A No.

Q During your entire tenure with the Philadelphia office, I guess that goes back twenty some years, all in Philly?

A Yes.

Q Do you know of any WEA person who transferred to a management job in Philadelphia from some other city that wasn't Philadelphia? Do you understand my question?

MR. SKIDMORE: I don't. Do you understand his question?

THE WITNESS: I'm not certain I understand your question.

BY MR. HORDES:

Q All the vacancy in the management positions in Philadelphia, Field Sales Manager, Sales Manager, Field Sales Manager of Black Music, et cetera, were they always filled by people who already were in the Philadelphia office?

MR. SKIDMORE: I'm sorry. I don't understand the question. When?

* * *

APPENDIX D

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF OHIO
WESTERN DIVISION

No. C-1-00-412

[July 9, 2001]

PETER M. HAGAN,	)
Plaintiff,	)
	)
v.	)
	)
WARNER/ELEKTRA/ATLANTIC CORP.,	)
Defendant.	)
	)

EXCERPTS DEPOSITION OF
SUSAN VICTORIA ARNOLD

* * *

[p.62]

compromise.

MR. HORDES: At lunch, I will go over the correspondence. Okay.

Q. In your capacity as an executive in HR from the late '80s through the '90s, were you ever told why WEA was promulgating affirmative-action plans?

A. I wasn't told why we were doing it initially.

Q. Uh-huh.

A. My understanding is that we are deemed a government contractor --

Q. Sorry. Go ahead.

A. -- and, therefore, have to prepare the plans.

Q. Is that just something you presume, or did someone tell you that?

A. Well, we had an audit one year by the OFCCP, and they said we were, and we had to do it.

Q. Just for the record, what is the OFCCP?

A. Office of Federal Contract Compliance Program, I think.

Q. How is WEA a government contractor?

A. I believe that we sell product to some companies that sell to like the PXs on the bases.

Q. Army bases and Navy bases and --

A. I think so. I don't personally know.

Q. And is your understanding that because WEA does

* * *

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

No. C-1-00-412

[June 8, 2001]

PETER M. HAGAN,
Plaintiff,

v.

WARNER/ELEKTRA/ATLANTIC CORP.,
Defendant.

EXCERPTS DEPOSITION OF
RAYMOND S. MILANESE

* * *

[p.35]

MR. HÒRDES: Sure. Right now is a good time.

(Whereupon a short break was taken at this time.)

BY MR. HORDES:

Q Mr. Milanese, I'm going to show you a document that's already been marked in the previous deposition of Peter Hagan as Defense Exhibit Thirty, and I ask you just to look at that document. Do you recognize that document?

A No.

Q You have not seen that document before?

A No.

Q About how many sales managers have you had at Philadelphia's branch office since you've been branch manager?

A Approximately six.

Q And of those six, how many of them were promoted from within and how many with were either hired off the street or came from another WEA region or WEA branch?

MR. SKIDMORE: Can you repeat the [p. 36] question for him? I'm sorry.

BY MR. HORDES:

Q Let me do it this way: Of all the WEA sales reps that have worked under you, have any of them come from you? Have any come from another WEA region?

A Yes.

Q And how many would that be?

A One.

Q Who was that person and where did he or she come from?

A Her name is Mak Kelly.

Q Where did she come from?

A She was, at the time, out of the New York branch.

Q And the other sales managers, they all were promoted from within the Philadelphia branch?

A One sales manager had already existed when I got there. The balance were promoted from within.

Q How about field sales managers, were any field sales managers ever transferred to Philadelphia from another WEA branch?

A Not that I recall.

* * *

[p.128]

better job at the time.

Q Did Dale Hill bring any fresh ideas to his job, that you can remember?

A I thought the world of Dale Hill. I thought Dale had a good number of ideas and I really started to see him progress through the course of that year. Again, I never thought it

would be short-lived. I thought the office was going to be there forever. Unfortunately, it was cut short, but I was really feeling good about the whole experience, to be quite honest with you, after a short period of time because I started to see a big improvement in Dale's attitude and thinking.

Q What kind of new ideas did he bring to you?

A I don't know if they were new ideas as much as they were -- I can sit here and give you a list that we tried this and that. I just saw a different attitude in him and when I needed something, he was there for me. He just seemed very sincere with me and any walls that were up in the beginning, I mean, we knocked them down very quickly, because I told [p.129] him it's me and you and we're going to run this thing. I gave him my pep up speech and I felt that he was communicating well with the customers. He had some bumps in the road, which was normal, but I thought he was progressing very nicely.

Q Did any customer complain to you that he wasn't seeing them as often as they would like?

A I never had a customer call me, I know that for a fact, and tell me that. I can't answer that question. I don't recall.

Q Do you recall any sales representatives complaining to you that Dale wouldn't get back to them with information that they needed to help them service an account?

A On occasion, Frank Resnick would complain a little in the past.

Q What was the nature of his complaints?

A I guess that it would take a little longer to get information from Dale sometimes. And when I went to Dale, Dale said, well, he didn't get the information from the labels, which didn't surprise me. It wasn't something I would get upset about

* * *

[p.164]

manager?

A As sales manager, no.

Q Have you ever asked anybody how he had done?

A No.

Q When you made your decision to offer Mr. Hill the field sales manager position in Philadelphia, did you consider him more effective as a sales manager than Pete Hagan had been?

A I can't answer that because I don't know how Pete was as a sales manager.

Q And what I hear you saying is, it didn't even enter your mind to consider Pete Hagan for that position?

A Correct.

Q And sitting here, you have no reason, other than the fact that it didn't enter your mind?

A Well, no, there were --

Q If I'm wrong, tell me.

A It didn't enter my mind to ask Pete because there was something that, you know, I did have a position open from September through December of '98, a sales manager [p.165] position, and Peter never asked me for an interview, he never expressed interest.

Q Slow down a minute. There was a position in September --

A When I let Pat Purcell go.

MR. SKIDMORE: I don't think he was done his answer.

BY MR. HORDES:

Q Go ahead.

A When you let Pat Purcell go, there was a period of time when that position was open.

Q Which Sue Costello took?

A Which Sue Costello took the job.

Q And you're talking about a period of time of September through?

A September through December of '98. I believe that's when Sue took the job in '98. Pete never expressed any interest in the job and never called me.

Q Did he know that the position was open?

A Oh, I'm sure he did.

Q How do you know that?

A Because all management usually -- I told all management about Pat Purcell leaving. As a matter of fact, the thing spread through our [p.166] industry. You don't get rid of a high level position like a sales manager without people knowing about it.

Q Aside from your supposition, do you have any specific recollection of telling Pete Hagan that there was a vacancy in the sales manager position in Philadelphia?

A No, I did not specifically sit down with Pete and tell him. I told Dale, but I didn't tell Pete.

Q Why did you tell Dale and not Pete?

A Because Dale was the head of the office and I would assume he would have mentioned something at his meetings.

Q Did you tell him to pass the word on to Pete?

A Yes. Well, not to Pete particularly. To the staff, yes. That was one of the reasons I never considered Pete. My impression of people, although I didn't have a lot of time to work with him, unfortunately, like I stated earlier, the window for Cleveland was short for me, but I understand that he was just an average employee. I understand, although. I did not talk to Lew

* * *

[p.182]

A Oh, yes.

Q What did you do in terms of filling that vacancy once Dale Hill turned it down?

A Well, we had already conducted interviews in Philadelphia for people who came forward from our branch office there and together Sue and I made a decision to bring Jeanne in, Jeanne White, who was a field sales manager for R & B music for the Philadelphia branch.

Q I guess Sue Costello did the interviewing; correct?

MR. SKIDMORE: Objection. Go ahead.

BY MR. HORDES:

Q For the position of field sales manager, the internal people, Jeanne White, I take it Sue Costello interviewed her, or not?

A Yes, she interviewed and I interviewed. We kind of both interviewed her, but Sue interviewed her, too.

Q Did that interview take place before or after Dale Hill turned you down?

A I don't recall. I can't even assume. I don't recall.

[p.183]

Q Would you ordinarily interview people for a position while you were still giving that position to somebody else?

MR. SKIDMORE: Objection; calls for speculation. Objection; hypothetical.

THE WITNESS: Can you phrase that differently?

BY MR. HORDES:

Q You said that you weren't sure whether Jeanne White, and others from Philadelphia, were interviewed for the field sales manager position.

A I think all the interviews were done. I don't know what date, though. I think they were all done.

Q They done by the time Dale Hill turned you down?

MR. SKIDMORE: Objection; asked and answered.

THE WITNESS: Yes, I think they were all done.

BY MR. HORDES:

Q When Dale Hill turned down the job, was there any thought to bringing Pete Hagan in and asking him whether he wanted the job now [p.184] that Dale turned it down?

A No, sir.

Q Why not?

A I think I already told you that.

Q You told me originally why you thought Dale was a better than Pete. My question to you now is: Now that Dale was out of the picture, did you then reconsider Pete?

A No, I didn't.

Q And the reason you did not reconsider Pete is because Dale Hill had said he was an average field service manager?

MR. SKIDMORE: That's one of the things he said.

BY MR. HORDES:

Q That's one of them. There had been some concerns raised by Camelot; correct?

A There was a concern that I heard through Dale and through label people about Camelot and Pete, yes.

MR. SKIDMORE: There were other things he's testified to.

THE WITNESS: Right. I mean, there were other things I had told you earlier.

[p.185]

BY MR. HORDES:

Q And you also noted that Pete never volunteered, even though he should have known about the job. And, he didn't show any interest in the job.

A He never showed any interest in the sales manager position that was open from a period of a couple of month before Sue got it, and he never showed me that he wanted -- he never told me personally that he wanted to move to Philadelphia or wanted to be transferred to Philadelphia. We never had that conversation.

Q Did you ever have any conversations with Pete Hagan, at all, about the desirability to transfer from one city to another?

A I don't recall Pete and I ever having a conversation like that.

Q Do you recall Pete being a party to a conversation with Pete Hagan, while you were in charge of Cleveland, where Pete Hagan expressed his willingness to transfer to other cities?

A I'm sorry. You'll have to repeat that.

Q While you were heading up the Cleveland [p. 186] office, do you recall being present in any conversation where Pete Hagan told you he was willing to transfer to other cities?

A I don't recall any conversations like that with Pete. I stated to you earlier conversations with Pete, when I would walk in, was in reference to Florida and his condo in Florida.

Q Did there ever open up a vacancy, that you're aware of, in Minneapolis for the position of sales manager or field sales manager while you were running Cleveland?

A I don't recall.

Q Do you recall offering Pete Hagan an opportunity to go to Minneapolis?

A No.

Q So, I gather then, when you and Ms. Costello were interviewing candidates for the field sales manager position in Philadelphia, the notion of considering Pete Hagan for that position, did that ever enter into your mind at that point in time?

A No, sir.

Q And when Jeanne White was promoted to field sales manager, that left a vacancy for a [p. 187] field sales manager of rhythm and blues in Philadelphia?

A Correct.

Q And in considering who to put in that position, did either you or Ms. Costello consider Pete Hagan for that position?

MR. SKIDMORE: Well, you can testify about what you thought, but you can't testify as to what she was thinking.

THE WITNESS: No, I never thought of Pete for that position.

BY MR. HORDES:

Q Did Ms. Costello consider Pete Hagan for that position?

MR. SKIDMORE: Objection.

THE WITNESS: I don't know.

BY MR. HORDES:

Q If you heard her.

A I have no idea.

Q When you decided to pick Jeanne White for the position as field sales manager of Philadelphia did her race plan any role in your decision?

A No, not at all.

Q She's African American; correct?

[p.188]

A Jeanne is, yes.

Q And Mary Ressner is African American as well; correct?

A Yes, she is.

Q When you were considering Ms. Ressner for the position of field sales manager of black music, did her race enter into your consideration?

A Not at all.

MR. HORDES: Will you mark this, please, Exhibit Twenty-three?

- - -

(Exhibit Twenty-three was marked for identification and received into evidence and is attached hereto.)

\- - -

BY MR. HORDES:

Q Let me know when you're finished with this.

A Yes, I will.

Q Have you seen that document before?

A Yes, I have.

Q And when did you first see that document?

A I don't recall.

* * *

[p.217]

hypothetical, calls for speculation. That's not what happened.

THE WITNESS: I agree with what David said. I don't know if I can give you an honest answer because I had already worked with Dale. I saw improvement in Dale. I had a different feeling with Dale than, apparently, Denny did.

BY MR. HORDES:

Q. During the time you were a branch manager, even before you took over the Cleveland office, were you aware of

any efforts by WEA home office to undertake steps to increase the representation of blacks and women in the management work force at WEA?

A Would you clarify "undertake steps" for me? I'm just a little unclear.

Q Let me back up and start with something else. During the time you were branch manager in Philadelphia, did the topic of increasing the representation of blacks and women in WEA's management ever become a topic of conversation with other WEA management?

A I was always told to hire the best person for the job, whether the person is [p.218] African American, a woman. It has to be the best person. Consider everyone. And that's pretty much the message that I grew up with in this company and the message I got from my superiors.

Q Understand. So, you never did hear anyone from WEA say: It's a good idea to have more blacks and more women than we have now in management positions?

MR. SKIDMORE: Objection; asked and answered.

THE WITNESS: I don't recall anyone ever saying that to me.

BY MR. HORDES:

Q. I'm going to show you what's already been marked as an exhibit in the Froio deposition as Exhibit Nine and ask have you seen this before?

A. No, sir, I've never seen this article before.

Q Do you know who Kevin Carney is?

A I know the name, but I just can't place it as of now.

Q Would it refresh your recollection if I told you he was the son-in-law of George [p. 219] Rossi?

A Son-in-law, no.

Q Excuse me. Stepson. I apologize. The stepson of George Rossi.

A Oh, okay. Then I know Kevin.

Q What role does Kevin play at WEA?

A I have no idea. I mean, I met him a couple of times at meetings, being introduced to him, but I don't even know if he is at WEA anymore. I have no idea.

Q Understanding that you have never seen this document before, do you recall being privy to any conversation, with WEA management, concerning Jessie Jackson's Rainbow Coalition?

A Never.

Q Aside from speaking to WEA management, did you ever learn from reading the media magazines, listening to television, whatnot, that Jesse Jackson's Rainbow Coalition was concerned about the lack of representation of blacks and women in management at the record companies and the record distribution companies?

MR. SKIDMORE: Assuming that to be [p. 220] true, go ahead.

THE WITNESS: To be quite honest with you, I don't recall hearing that. And it's funny, I don't know --

MR. SKIDMORE: You've answered the question.

BY MR. HORDES:

Q You can finish.

A I don't ever remember hearing that, no.

Q Is it your belief, as of the mid to late 1990's, that there was under-representation of blacks and women at WEA management?

MR. SKIDMORE: Objection; calls for speculation.

THE WITNESS: I have no idea.

BY MR. HORDES:

Q It's not a subject which entered your mind?

A Not at all.

Q Were you present at a 25th Anniversary Dinner in Anaheim, California which Dave Mount gave a speech?

A Yes, I was.

Q So, you were there for that speech?

A I was there at the meeting. I'm sure I

* * *

[p.232]

A Well, I'm proud to say that the Philadelphia branch had never won an award until we teamed up with Cleveland. And Cleveland/Philadelphia was such -- we won it twice in a row.

Q When?

A I believe it was '98 and '99, and I felt that the team overall, a team now, did a fantastic job, and that includes everybody on that team. Individually, we had work to do, but that's okay, as a team they were functioning and they did a wonderful job. Two years in a row, first time ever. It was a great, great honor.

Q Let me direct your attention to Plaintiff's Exhibit Twenty-two.

A Okay.

Q The planning memo. Mr. Milanese, you identified this previously as your planning memo for 1998.

A Yes.

Q And you gave observations about managers that you worked with.

A Backup, yes.

Q When did you make these observations?

* * *

APPENDIX F

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

No. C-1-00-412

[June 6, 2001]

PETER M. HAGAN,	)
Plaintiff,	)
	)
v.	)
	)
WARNER/ELEKTRA/ATLANTIC CORP.,	)
Defendant.	)
	)

EXCERPTS DEPOSITION OF
RICHARD L. FROIO

[p.108]

Q. So I gather you never promoted him to sales manager, he was already there?

A. Correct.

Q. How would you rate him as a sales manager?

A. He was a good sales manager.

Q. Did he have any particular strengths?

A. Yes.

Q. What were those strengths?

A. I think he did a good job. I mentioned earlier about the functions of a sales manager, number one sales, monitoring how well we were doing against our numbers. He was diligent in that regard, advertising which was a big part of his job, I thought he did a very good job advertising.

Q. Were there any particular weaknesses you noted in Mr. Hagan's performance?

A. Yes.

Q. What were they?

A. His people skills, personal skills, personnel skills.

Q. Can you elaborate on that?

[p.109]

A. I felt he needed work sometimes dealing with individuals who worked for him, his manner, the way he approached them, the way he motivated them and we talked about it many times.

Q. You advised him of what you thought he needed to do to improve?

A. Yes.

Q. How many meetings did you have with him in which --

A. I don't recall. We worked together four years. I'm sure numerous.

Q. What about his people skills did you find wanting? Is he too easy on people, too easy, to gruff?

A. Too abrupt, too gruff at times.

Q. I gather and correct me if I'm wrong, you have nothing in writing --

A. Oh, no.

Q. -- to memorialize any particular kind of counseling you gave Mr. Hagan?

A. No. It was verbal.

Q. Based on your input, did he improve?

[p.110]

A. Yes. I like to think I had something to do with that, yes, absolutely.

Q. Did he improve to the point where you no longer had to counsel him on this type of problem?

A. No.

Q. He continued to have the problem?

A. Well, less and less but he did improve, absolutely.

Q. And at the time let's say late '94 or early '95, how would you describe his improvement in this area?

A. Better than it was when I started in '91.

Q. If had to rate it and it may be difficult, but if you have sort of a spectrum of no improvement, zero improvement on the left-hand side and a hundred percent improvement on the right-hand side, I know that you can't quantify this exactly, but how far along that bar line would you say he was as of the end of 1994?

MR. SKIDMORE: Objection, the question is ambiguous. You can answer if you [p. 111] understand it.

A. No, I understand it. I certainly -- if zero is where he started, ten is where he would be perfect, no one is perfect, I certainly think he would be six or seven.

Q. Would you say the trend was up at the time you left as opposed to relapsing and going back down?

A. I would say the trend was up.

Q. When you say that you talk about his people skills as you described a little while ago, did you observe that firsthand?

A. Yes.

Q. As opposed to having people complain to you?

A. Both.

Q. Who complained to you about Pete Hagan?

A. I don't specifically remember the names. I mean again it was over four years, many people dealing with you dealt with a lot of individuals.

Q. Approximately how many people complained to you about Pete Hagan?

[p.112]

A. More than a handful.

Q. More than five?

A. I would say that.

Q. More than ten?

A. I don't remember.

Q. Were these both management and non-management people --

A. Yes.

Q. -- that were complaining?

A. Yes.

Q. When you say he was abrupt and gruff, were there complaints that he was yelling at people?

A. I don't recall that.

Q. How about using profanity in front of people?

A. I don't recall.

Q. How about physically if not assaulting them, were there any of those kind of complaints?

A. No, I don't recall that.

Q. Did you ever relay any of these concerns that you and about Pete Hagan to anyone higher up like Mr. Droz or Mr. Mount?

[p.113]

A. Yes.

Q. Tell us about that.

A. Again briefly every year we would do a planning memo. Not briefly, it was a major document, I guess. But in that memo I would write a little line -- two lines, paragraph on each manager. In those memos I would put in writing very effective, good number two man, needs help personnel skills.

Next year making improvement with personnel, that sort of thing. So that is -- that would go to the president of the company and George Rossi, Larry Weiss, Jack O'Connell, the people I had to turn it in to.

Q. Do you still have those planning memos at home?

A. Yes, these are the ones I mentioned earlier.

REQ MR. HORDES: I don't recall getting any planning memos from you. I do have a planning memo. I have independently. It doesn't mention Pete at all. I would ask that you provide them. I think -- I believe I had asked for any and all documentation, memos about Pete Hagan and you complied with a substantial

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APPENDIX G

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

No. C-1-00-412

[July 10, 2001]

PETER M. HAGAN,	)
Plaintiff,	)
	)
v.	)
	)
WARNER/ELEKTRA/ATLANTIC CORP.,	)
Defendant.	)
	)

EXCERPTS DEPOSITION OF DAVID MOUNT

* * *

[p.61]

MR. HORDES: It is. It is in brackets.

Q. I guess that means that you didn't actually say "minority." They stuck it in. But I guess my question acknowledges that.

I guess my question to you is, what does "a goal" mean to you in terms of hiring women or minorities?

A. Well, I think the goal is to have the best possible work force you can have.

And to me, that means casting the net as widely as you can, which means that you don't put artificial barriers in place, that you recruit as widely as possible when you are filling positions. And to me, that's the goal.

The goal is to have a -- the best possible team you can put together. And that would include women, minorities.

Q. White people?

A. White people, absolutely. I'm one of them.

Q. And I gather -- and correct me if I'm wrong -- a goal does not include striving for a certain arithmetical percentage of work force being a certain category.

A. That's correct. It does not.

MR. SKIDMORE: Don, at some point, can I use another rest room break.

MR. HORDES: Off the record.

(A recess is taken.)

[p.62]

MR. HORDES: Could you repeat the last question.

(The record is read by the reporter.)

MR. HORDES:

Q. When you are quoted here as saying -- and I'm sort of midway through the last paragraph - "it is a goal to improve, and promote" -- "goal to improve," comma, "and promote" --

A. Uh-huh.

Q. -- well, again, bracket, "minority employees," you are indicating there you were not necessarily referring to minority employees, or do you think you really were?

A. Well, the whole article is about women and minorities, so I would guess that he characterized it that way for the article.

Q. But when you were quoted, you were thinking in your mind of both women and minorities?

MR. SKIDMORE: Objection. Mischaracterizes.

MR. HORDES:

Q. Well, I'm asking -- That was sort of a leading question. Let me just back off.

When you were talking about it being a goal to promote, did you have in mind minority employees and women or just minority employees?

A. I would have probably said something like [p.63] "promote broadly" or something like that.

But I -- You know, again, I don't remember this exact conversation I had with this person.

Q. Understood.

But I guess my question is, did you have in mind women and minorities or just --

A. Well, as I said, my own goal was to make sure we had the best work force possible. That means not having barriers.

Q. All right.

You also mention the word "promoting," so I guess you are talking about breaking down barriers to promotion of the best qualified people.

A. Yes.

Q. As well as hiring?

A. If that's what it takes to get the right people in the right job, correct.

Q. Then I am quoting further, quote, "As you go down each rung of the ladder [at WEA], you will see a pool of [minority] talent."

What were you trying to convey there?

A. Well, again --

MR. SKIDMORE: Objection. It speaks for itself.

THE WITNESS: Okay.

MR. SKIDMORE: But you can go ahead.

[p.64]

THE WITNESS: Well, again, I think my goal as a manager was to make sure that we were recruiting as broadly as possible at every level of the company. And that's what I was referring to.

MR. HORDES:

Q. Were you referring to a pool of -- says, bracket, "minority," end bracket, "talent."

What pool did you have in mind there, a pool of women, pool of minority?

A. Well, first of all, this "minority" was the reporter's word, not mine.

I may have just said --

Q. Right.

A. -- " a pool of talent." But the article was about women and minorities, so he was trying to make his point.

Q. Okay.

The last sentence of the article -- again, it's a quote of yours, at least the reporter is quoting you as saying this -- quote, "One of our goals is to make sure that we work the pool up the ladder," unquote.

Again, do you recall making that statement?

A. Not specifically.

Q. Do you recall telling the reporter that WEA was making an effort to -- Well, strike that.

[p.65]

Understanding, as you just said, that's not an exact quote, and I understand that -- I've been misquoted, too -- in your own words, what do you recall -- I know it's years later obviously. What do you recall saying in --

A. Well, if you just take out his words and you say, "As you go down each rung of the ladder, you see a pool of" -- "pool of talent," one of our goals is to make sure we work that pool up the ladder.

Cream rises to the top. You want to make sure you have the best people at every -- every stage of that promotion ladder.

Q. Without discriminating against anybody?

A. Exactly.

Q. Have you ever stated to anybody at WEA words to the effect that it is desirable to increase the representation of minority individuals into the ranks of management, or words to that effect?

A. You know, I don't recall specific comments.

But I think, again, one of my goals -- one of the goals I have had for the company is that we have a broadly diverse work force representing the best people we can for a particular job.

Q. Well, I'm not trying to spar with you. I'm really not. I hear you saying two different things.

One is you want a diverse work force, management

* * *

APPENDIX H

EXCERPT REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

EXHIBIT A

CATALOGUE OF MISSTATEMENTS OF FACT MISSTATEMENTS IN PLAINTIFF'S RESPONSE

- **Plaintiff's Response:**
  "In contrast to Sales Managers and Field Sales Managers, or Sales Representatives, specialty Field Sales Managers such as Field Sales Managers-Black Music have no sales function at all. Hill Depo. at 57." (p. 3)

  - **The Undisputed Facts:**
    This is simply not Dale Hill's testimony. *See* Hill Depo. at 52-59. Hill explained that as Field Sales Manager of Black Music, he worked with and supervised the Sales Representatives to increase sales. Schone also testified that Field Sales Managers of Black Music supervise the sales function, as do Field Sales Managers and Sales Managers, and Field Sales Managers of Black Music often actively participate in sales efforts. Schone Depo. at 162-63.

- **Plaintiffs Response:**
  Hagan cites Schone's deposition testimony at page 22, Froio's deposition testimony at pages 142-44, and Aliberti's deposition testimony at page 33 for the

proposition that the duties of Branch and District Sales Manager positions are virtually the same. (p.4)

- The Undisputed Facts:
  When the record is viewed in its entirety, it becomes very clear that this is not the substance of the witnesses' testimony. Although these witnesses did testify as to the similarities of the two positions, they also emphasized the significance of the additional administrative and personnel duties associated with being the Cleveland District Sales Manager, the top person in that office. Schone Depo. at 115-16; Froio Depo. at 142-43; Aliberte Depo. at 40-46.

- **Plaintiff's Response:**
  "As of Spring of 1995, Mr. Hagan led the entire sales effort from the Cleveland Branch Office ...." (p. 5)

  - **The Undisputed Facts:**
    This is simply not true. The Branch Manager was in charge of all of the functions within his respective branch office, including sales. Schone Depo. at 72; Froio Depo. at 69-70. Prior to 1995, Hagan was a Branch Sales Manager, the number two person in the Cleveland branch office. Hagan Depo. at 125-26, 141-42. As such, Hagan never "led the entire sales effort" of the Cleveland branch. That job was Rick Froio's as Branch Manager.

- **Plaintiff's Response:**
  "... WEA has always maintained a strict written policy addressing the need to engage in progressive discipline of any employee whose performance or attitude is found wanting." (p. 6)

- **The Undisputed Facts:**
  It is certainly true that WEA's Human Resource Department sent a memo to the Cleveland branch office explaining the concept of progressive discipline. Froio Depo. at 38. It is also true that Froio did not employ progressive discipline with his management staff. Froio Depo. at 43-44. Schone had never seen any memorandum regarding progressive discipline and did not employ it. Schone Depo. at 40-42.

- **Plaintiff's Response:**
  "...the front office of WEA in Los Angeles also never received from the Field news of anything critical about Mr. Hagan. Mount Depo. at 31-32." (p. 6)

  - **The Undisputed Facts:**
    It is true that Dave Mount, the CEO of WEA, could not recall getting any feedback on Hagan's performance, good or bad. Mount Depo. at 31. It is <u>not</u> true that WEA's "front office" never received from the Field anything critical about Hagan. For instance, Fran Aliberte, who was an Executive Vice President of Sales in WEA's California office, spoke to Lew Garrett who requested that Hagan not be put in charge of WEA's Cleveland office. Aliberte Depo. at 77. Aliberte heard a number of other complaints about Hagan during his tenure in WEA's home office, including complaints about Hagan's poor people skills, failure to follow up on sales figures, unoriginal marketing plans, and poor leadership. *Id.* at 56-63. Indeed, Aliberte spoke with Hagan on a number of occasions about some of these deficiencies, *Id.* at 66, 68-69.

- **Plaintiff's Response:**
  "All in all, Froio was very satisfied with Mr. Hagan's performance as his Branch Sales Manager, referring to him as his 'right hand.' (Froio Depo. at 117)" (p. 7)

  - **The Undisputed Facts:**
    Froio did view Hagan as a "good number two." Froio Depo. at 117. Froio also testified about Hagan's weaknesses. Froio Depo. at 108-09. It is also true that Froio recommended against Hagan becoming the top person in the Cleveland office after Froio's departure, in light of the lack of Hagan's leadership skills, and in light of the fact that Camelot asked that Hagan not be put in the top position. Froio Depo. at 164-65.

- **Plaintiff's Response:**
  "Mount embraced the sentiments expressed in the [March 26, 1994 article in Billboard Magazine]." (p. 8)

  - **The Undisputed Facts:**
    Mount explained that the quotation contained in the article was not what he said. Mount explained that WEA's goal is to create the best possible workforce. In order to achieve that goal, it was necessary to eliminate artificial barriers to recruitment and promotion of minorities. Mount repeatedly explained that WEA did not have quotas and was committed to hiring the best candidates without discriminating against anyone. Mount Depo. at 61-65.

- **Plaintiff's Response:**
  "Significantly, WEA headquarters representative Kevin Carney thought enough of this article [regarding Jesse Jackson and the music industry] to circulate it throughout WEA's branches." (p. 8)

- The Undisputed Facts:
  Kevin Carney was not even a WEA employee. He was an employee of Warner Brothers that simply had an office in WEA's Burbank, California facility. Hagan Depo. at 440-41. Apparently, Carney sent a copy of this article to Hagan. The decisionmakers with respect to Hagan had never seen this article and expressly rejected the comments made therein. Schone Depo. at 284-85; Milanese Depo. at 69.

- **Plaintiff's Response:**
  "WEA carefully monitored the racial composition of its workforce, keeping detailed records in the home office in Los Angeles as to the number of minorities, especially African-Americans, who occupied positions of management in the various districts and branches throughout the country at any given time." (p. 9)

  - **The Undisputed Facts:**
    WEA was required by government regulation to keep track of minorities and women in its employ. Arnold Depo. at 62; 41 C.F.R. § 60-2.1(b)(l)(i). There is no evidence whatsoever that WEA placed special emphasis on African-Americans, as implied by Hagan.

- **Plaintiff's Response:**
  "...WEA was secretly planning to replace him as Sales Manager. The impetus for this change originated in WEA's home office." (p. 12)

  - **The Undisputed Facts:**
    This is simply not the evidence. Schone and Froio interviewed prospective candidates at the Cleveland office where Hagan worked on a daily basis. Schone Depo. at 116-17; Froio Depo. at 145-46. As Schone

observed, "he would have had to be on another planet not to know about [the interviews]." In addition, there is no evidence that the impetus to interview candidates and promote Hill was from WEA's home office. Schone recalls speaking with Froio about needing "somebody in Cleveland that was strong, could be a leader, and be the number one person in Cleveland." Schone Depo. at 104. WEA home office executives, particularly Aliberte, were kept informed and made suggestions about potential candidates. Schone Depo. at 59, 62-63, 112-13. The fact that Froio learned about the interviewing process, itself, from WEA's home office does not mean that that the impetus for the interviewing came from home office. Froio Depo. at 154. In fact, the witnesses uniformly testified that Schone made the decision to interview various candidates. Schone Depo. at 104-05; Aliberte Depo. at 111-12.

- **Plaintiff's Response:**

"WEA's home office not only created the new position and decided to fill it by interviewing new candidates, but it also offered up the names of the individuals who it deemed should be considered for the new job." (p. 12)

- **The Undisputed Facts About the District Sales Manager Position:**

The District Sales Manager position was not "created" in 1995. The record reveals that the District Sales Manager position has been a part of the WEA's management structure since at least 1979, when Schone held the job title in WEA's Kansas City office. Schone Depo. at 20. Nor were the additional duties associated with the District Sales Manager position fabricated. All of the witnesses testified that there

were significant additional responsibilities associated with the position. Hagan Depo. at 125-26, 293-95, 326-27; Froio Depo. at 142-43; Aliberte Depo. at 132-34.

- **The Undisputed Facts About the Process:**
  Schone, together with Froio, decided who to interview. Schone certainly asked Aliberte (who worked in WEA's home office) who he might interview in addition to the people that Schone and Froio had already decided to interview. Schone Depo. at 59, 62-63, 112-13. This was Schone's normal procedure for hiring management because Aliberte, as the National Vice President of Sales, had knowledge about personnel throughout the country, whereas Schone's knowledge was more limited to the midwest. *Id.*

- **Plaintiff's Response:**
  "In the past, whenever Mr. Schone wanted to hire a sales manager, he took it upon himself to identify and interview candidates...This was the first time that WEA home office ever took the initiative to declare the names of the persons to be considered for the position." (p. 13)

  - **The Undisputed Facts:**
    This statement flatly contradicts the decisionmakers' description of the hiring process. Schone explained that he began the selection process by generating his own list of potential candidates based upon his interactions with and impressions of individuals who he worked with or in close proximity to. Schone Depo. at 112-13. Schone then checked with WEA's home office to see if there were other qualified candidates at WEA's other facilities around the

country. *Id.* at 59, 62-63, 112-13. Schone then conducted interviews from that cumulative list of candidates. This is the process that was employed in selecting Dale Hill.

- **Plaintiff's Response:**
  "... Mr. Hill had absolutely no sales experience at all at WEA." (p. 13)

  - **The Undisputed Facts:**
    This statement misrepresents Hill's experience before receiving the position in Cleveland. Prior to coming to Cleveland, Hill was a Field Sales Manager of Black Music in WEA's Atlanta office. In that capacity, Hill was responsible for the sales and marketing of urban music for the Warner, Elektra, and Atlantic labels. Hill Depo. at 52. Hill worked in conjunction with Sales Representatives to service Atlanta's account base, make product presentations to potential purchasers, create and monitor advertising campaigns, and otherwise attempt to maximize music sales in the Atlanta market. *Id.* at 52-62. The functions performed by the Field Sales Managers of Black Music were considered "sales" functions. Schone Depo. at 162-63. Hill also had sales experience at Turtle's Records. Hill Depo. at 17-21.

- **Plaintiff's Response:**
  "Also unparalleled in the history of WEA was the promotion of such a relatively low-level manager like Dale Hill to a top sales position in a district. Mr. Hill was basically leap-frogged two management levels to a top sales position without first serving in an apprenticeship as a sales representative or field sales manager." (p. 14)

- **The Undisputed Facts:**
  This assertion is wrong on two levels. First, the Field Sales Manager and Field Sales Manager of Black Music positions were equivalent; both reported directly to the Sales Manager. Schone Depo. at 52-52. Second, two-level advancements in management were not "'unparalleled." Milanese testified that four of the six Branch and District Sales Managers in the Philadelphia branch had come from significantly lower ranks in WEA's management. Milanese Depo. at 45-47. Also, Froio, who Hagan greatly respected, went from a position as a Field Sales Manager to being Cleveland's Branch Manager, a promotion over two management levels. Froio Depo. at 14.

- **Plaintiff's Response:**
  "Mr. Schone supposedly chose Dale Hill based on his sales experience in Atlanta." (p. 15)

  - **The Undisputed Facts:**
    Hagan's Response misstates the reasons that Schone proffered for selecting Hill. Schone testified that the person selected for the Cleveland District Sales Manager position had to be a leader that could help lift the Cleveland office out of its downward slide. Schone Depo. at 104, 153. Schone knew that Hill had done an excellent job in his position as a Field Sales Manager of Black Music in Atlanta, that Hill had a good knowledge of WEA's product, and that Hill had demonstrated an ability to rally sales personnel to achieve their goals. Schone Depo. at 151-52; Aliberte Depo. at 116, 217. Hill also exhibited the desire and passion for the position that Schone was looking for. Hill had turned down a number of opportunities with WEA's competitors and associated record labels in

order to take the Cleveland District Sales Manager position. Schone Depo. at 130-31, 149-51.

- **Plaintiff's Response:**
"Dale Hill turned out to be an absolute disaster in all aspects of his job performance as Sales Manager during his four-year tenure in Cleveland." (p. 16)

  - **The Undisputed Facts:**
This is a wild exaggeration of the facts. It is true that Hill had some performance problems during his first year and a half on the job in Cleveland. Schone Depo. at 207-08. It is also true that Schone believed that Hill significantly improved his performance. *Id.* at 238, 250-51. By the time, responsibility for the Cleveland office was transferred to Ray Milanese in Philadelphia, Schone believed that Hill was performing within expectations. *Id.*

    Milanese testified that he "thought the world of Dale Hill." Milanese Depo. at 128, 133-34. Under Hill's leadership, the Cleveland office helped the Philadelphia branch win WEA's Branch of the Year Award for the first time. *Id.* at 231-32. Milanese also testified that he received fewer complaints about Hill's performance than he did about other managers. *Id.* at 133-34.

- **Plaintiff's Response:**
"Ray Milanese had his own problems with Dale Hill. Susan Witt made another allegation of harassment by Dale Hill and threatened Milanese with a civil lawsuit against WEA. (Witt depo. at 259-264; Milanese Depo. at 112-13). Again, as before, Hill by his own admission was never made aware of these complaints by Susan Witt.

(Hill Depo. at 189). Ray Milanese also noticed shortcomings in Dale Hill's performance. (Milanese Depo. at 171-73)." (p. 19)

- **The Undisputed Facts:**
  Witt, a Shipping and Receiving Clerk, testified that she complained that Hill had yelled at her after she refused to process and ship a WEA mailing. Witt Depo. at 44-45. Milanese recalls that he spoke to Witt briefly about her allegations and referred her to WEA's HR Department. Milanese recalled no further problems. Milanese Depo. at 114-16, 18. It is also true that Milanese received fewer complaints about Hill than he did about other managers, *Id.* at 133-34.

- **Plaintiff's Response:**
  "WEA's refusal to offer Pete Hagan the position of Field Sales Manager or Field Sales Manager of Black Music in Philadelphia also ran contrary to WEA's long-established policy of "bumping" managerial individuals to the next lowest managerial position rather than laying them off during a downsizing." (p.21)

  - **The Undisputed Facts:**
    There is no evidence that a "bumping policy" existed at WEA. None of the WEA executives that were involved in the challenged decisions were aware of such a "policy." Schone Depo. at 48-49; Froio Depo. at 48-49; Milanese Depo. at 38-39. Hagan has not presented any written documentation verifying the existence of such a policy, nor has anyone in WEA's management ever told Hagan that such a policy exists. Hagan Depo. at 427.

- **Plaintiff's Response:**
  Hagan was offered "a consultancy agreement, in which Mr. Hagan would be given the title of 'Sales Advisor' for a finite term from June 1, 1999 through December 31, 2000. He would be paid $4,000 per month ($48,000 annualized), but would not be provided a WEA office, nor a home office set-up, or paid vacation time." (p. 22)

  - **The Undisputed Facts:**
    Hagan has left out an important fact about the consulting agreement that he was offered. Under that agreement, Hagan was only required to work a maximum of 10 hours per month. Hagan Depo. at 54, Def. Exh. 5 (Supp. App., Exh. F).

- **Plaintiff's Response:**
  Hagan was offered "[a] classic severance package in which he would be given $152,500 in exchange for a total release of his claims." (p. 23)

  - **The Undisputed Facts:**
    The enhanced severance package offered to Hagan when Cleveland closed was worth far less than $152,500. Hagan Depo. at 54, Def. Exh. 5 (Supp. App., Exh. F).

- **Plaintiff's Response:**
  "Pete Hagan has adduced other circumstantial evidence upon which a reasonable jury could rely to conclude that the defendant was motivated by it illegal affirmative action plans, and no other reason." (p. 27)

  - **The Undisputed Facts:**
    All of the decisionmakers in this case testified that their respective decisions were not made pursuant to WEA's

affirmative action plan and that race and sex played absolutely no part in those decisions. Schone Depo. at 42-43, 177-78; Milanese Depo. at 187-88, 217-18, Costello Depo. at 7, 9.

- **Plaintiff's Response:**
"...for the first time, home office took the lead in pushing Dale Hill as a primary candidate for the Sales Manager's job. Schone admitted that he didn't want him." (p. 31)

  - **The Undisputed Facts:**
This was not, by any means, the first time that Schone contacted home office regarding names of potential candidates. As discussed above, Schone's normal process for hiring was to compile a list of potential candidates based on his own experience and then to contact home office to see if there were any other possible candidates in WEA's other offices around the country. Schone Depo. at 59, 62-63, 112-13. Nor did WEA's home office "push" for Dale Hill's selection. Schone was never told who to interview or select and had never had his selection overturned by WEA's home office. *Id.* at 58-59, 62-63.

- **Plaintiff's Response:**
"Finally, the interviewing supervisors in the instant case... did not fully review the qualifications of minority promotee, Dale Hill... Schone admits that he did not review Dale Hill's personnel file prior to hiring him. Nor was he terribly interested in Dale's sales or advertising experience. Froio's interview of Hill was, as noted earlier, also perfunctory. He did not even review his personnel file. As to why he chose Dale Hill, the only thing he could think of was that Hill was involved in youth activities in the Atlanta community." (p. 31)

- **The Undisputed Facts:**
  This is a mischaracterization of the record evidence. Schone was generally familiar with the functions and responsibilities that Hill had as a Field Sales Manager of Black Music in Atlanta. Schone Depo. at 162. Schone spoke with Bill Biggs, Hill's immediate supervisor, regarding Hill's qualifications and performance in his previous job. Schone and Froio interviewed Hill and discussed their impressions of him in relation to the other candidates after all of the interviews were complete. *Id.* at 120, 122-23, 148-49.; Froio Depo. at 160-61. It is true that Schone did not review Hill's personnel file, but he never reviewed personnel files before hiring any candidates. Schone Depo. at 64-65. For his part, Froio participated in the interviews and discussions with Schone. Froio Depo. at 160-61. Although Froio did not recall many of the particulars of the interviews, he did recall that Hill presented himself very professionally and expressed a strong interest in the job. *Id.* at 172. Overall, Froio found Hill to be "very impressive." *Id.*

- **Plaintiff's Response:**
  "There is nothing particularly unusual about liberal white executives trying to bring in more blacks and minorities into the workforce ...." (p. 32)

  - **The Undisputed Facts:**
    There is nothing in the evidence about the political persuasion of any of WEA's executives.

- **Plaintiff's Response:**
  "...Pete Hagan credibly testified that the theme of the party was 'The Decadent 1940's,' and Pete Hagan thought

the height of decadence was Adolph Hitler so he dressed up as a Nazi." (p. 36)

- **The Undisputed Facts:**
  Despite Plaintiff's mischaracterization of the record, Hagan's decision to dress up as Hitler was not innocently made. Although Hagan contends that the function that he wore the costume to was a "Decadent 40's" party, Hagan's own deposition testimony indicates that it was a "Decadent *Decades*" party. Hagan Depo. at 9, 13. Of all the people from all of the decades that Hagan could have chosen, he decided to dress up like Hitler for a party attended by WEA's customers and hosted by a Jewish woman. As Schone noted, this constituted extremely poor judgment on Hagan's part. Schone Depo. at 160.

- **Plaintiff's Response:**
  "Ultimately, everyone got a good laugh out of the costume." (p. 36)

  - **The Undisputed Facts:**
    It is undisputed that Schone did not find Hagan's wearing of a Nazi uniform to be funny. Schone thought that it demonstrated poor leadership and judgment. Schone Depo. at 160.

- **Plaintiff's Response:**
  "It is not true, as WEA argues in its brief, that Mr. Hagan 'remained the No. 2 person in the Cleveland office.'" (p. 41)

  - **The Undisputed Facts:**
    Hagan's own deposition testimony reads as follows:

Q: You remained the number two person in the [Cleveland] office?

A: Correct.

Hagan Depo. at 255.

APPENDIX I

EXCERPT
AFFIRMATIVE ACTION PLAN
AS OF 3/31/97

EXHIBIT L

WARNER/ELEKTRA/ATLANTIC CORPORATION
1 WARNER COURT
BRIDGEPORT, NJ 08014

PURPOSE AND POLICY

A. Purpose of Affirmative Action Program

This is the Affirmative Action Program for Warner Elektra Atlantic Corporation at 1 Warner Court, Bridgeport, NJ 08014. It is a specific results-oriented procedure to which the Company has been and is committed. It is designed to coordinate the Company's efforts to maintain equal employment opportunity.

B. Equal Employment Opportunity Policy

It is the policy of the Company to hire well qualified people to perform the tasks necessary to accomplish its central purpose, ie, distribution of recorded entertainment and related products An integral part of this policy is to make all employment decisions without discrimination because of race, religion, color, national origin, sex, marital status, or age and

to advance the hiring and employment of qualified handicapped persons, disabled veterans and veterans of the Vietnam era through positive recruitment programs.

Decisions concerning employment will be based on the individual's qualifications as they relate to the requirements of the position under consideration. The phrase "employment decision" includes recruitment, hire, promotion, compensation, benefits, transfers, discipline, terminations (including layoffs), recalls and training (including apprenticeships).

It is also the Company's policy to advance the hiring and employment of qualified handicapped persons. Employment decisions, as that phrase is described above, will be based on the job requirements of the position and the ability of the Company to make reasonable accommodations for the physical or mental limitations of the individual.

In addition, it is the policy of the Company that local state and federal laws and regulations implementing equal employment opportunity objectives shall be fully complied with.

C. The Objective

The objective of this Equal Employment Policy is to avoid discrimination in employment and to establish a workforce profile with respect to race and sex which is an approximate reflection of proper "utilization"*,

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* Nothing contained in this Affirmative Action Program, including the use of the terms "utilization", "problem areas",

and to advance the hiring and employment of qualified handicapped persons, veterans of the Vietnam era and disabled veterans.

Achieving this objective calls for a continued good faith effort to reflect full utilization of minorities and women at all levels of employment; to prohibit discrimination in employment because of race, color, sex, marital status, religion, age, handicap, veteran status, or national origin; and to provide a work environment free of discrimination.

The major thrust of the Company's efforts to achieve this objective is through the Affirmative Action Program. A key objective of this program is to set goals and timetables and to achieve them in those areas in which "underutilization" of women and minority group persons exists. Additionally, we attempt to identify handicapped persons, disabled veterans, and veterans of the Vietnam era. If an applicant or an employee is handicapped or a disabled veteran, the Company will attempt to make a reasonable accommodation, where necessary.

The Company uses its best efforts to assure the full realization of the stated objectives through a continuous procedure of monitoring and reporting.

"goals", and "timetables" shall be interpreted as an admission that Warner Elektra Atlantic Corp has been, or is in violation of any Federal or State law or Executive Order. To the contrary, the Company has always sought to provide equal employment opportunity to all persons regardless of race, color, religion, sex, marital status, age, or national origin.

D. Reaffirmation

This document represents a reaffirmation of the Company's policy and practices to make all employment decisions without discrimination because of race, religion, color, national origin, sex, marital status, or age and to advance the hiring and employment of qualified handicapped persons, disabled veterans and veterans of the Vietnam era through positive recruitment programs.

APPENDIX J

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 02-3602

PETER M. HAGAN, Plaintiff-Appellant,	)
v.	)
WARNER/ELEKTRA/ATLANTIC CORPORATION, Defendant-Appellee.	)

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

No. C-1-00-412

EXCERPTS
FINAL BRIEF OF PLAINTIFF-APPELLANT,
PETER M. HAGAN, JR.

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Attorney for Plaintiff-Appellant, Peter M. Hagan, Jr.

I. STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

Pursuant to 28 U.S.C. § 1331, the District Court below had original jurisdiction over Plaintiff-Appellant's claim of race and sex discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, as well as Plaintiff-Appellant's claim of age discrimination in violation of the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.*, as these issues present federal questions.

Pursuant to 28 U.S.C. § 1367, the District Court had supplemental jurisdiction over Plaintiff-Appellant's pending state claims.

This Court's jurisdiction in these proceedings derives from 28 U.S.C. § 1291. The District Court's granting of Defendant-Appellees' Motion for Summary Judgment constitutes a final order which disposes of all claims with respect to all of the parties.

II. STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the lower court erred in finding that Mr. Hagan had failed to adduce sufficient direct evidence of reverse race discrimination by his employer when it demoted him and replaced him with a less qualified minority individual and later offered to lesser qualified minority individuals opportunities for transfer to open managerial positions elsewhere in the company, without first offering those opportunities to Mr. Hagan.

2. Whether the lower court erred in imposing on Mr. Hagan a modified and more onerous burden of making out a *prima facie* case of reverse race discrimination.

3. Whether the lower court erred in finding that Mr. Hagan failed to establish a *prima facie* case of reverse race discrimination because he did not present background circumstances indicating that his employer was that unusual employer who discriminates against the majority.

4. Whether the lower court erred in finding that Mr. Hagan and the lesser qualified minority employees who were treated more favorably than he were "similarly-situated".

5. Whether the lower court erred in finding that his employer's demotion of him and later refusal to consider him for transfer to open managerial positions for which he was qualified amounted to adverse employment decisions.

6. Whether the lower court erred in failing to apply the correct legal standards in finding that Mr. Hagan had failed to make out a *prima facie* case of age discrimination.

APPENDIX K

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

No. C-1-00-412
(Judge Weber)

[December 21, 2001]

PETER M. HAGAN, Plaintiff,	)
v	)
WARNER/ELEKTRA/ATLANTIC CORP., Defendant.	)

EXCERPT OF PLAINTIFF'S MEMORANDUM CONTRA DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Defendant's selective citation to limited facts in the vast documentary and testimonial record of this case[1] does not

[1] The parties took 18 depositions in 7 cities across the country, totaling approximately 4000 pages. Over 100 exhibits were introduced by each side.

begin to describe what happened to Plaintiff Peter Hagan at the hands of Defendant Warner/Elektra/Atlantic Corporation (herein "WEA") to further its improper race-biased agenda. Mr. Hagan a 49 year old Caucasian man who gave WEA 21 years of faithful and successful service as a sales executive for WEA. (See EEOC Charges, attached to Plaintiff's Complaint). His career was suddenly undermined in 1995 when he was demoted so that a patently unqualified young African-American male, Dale Hill, could take his place. Hagan's career disintegrated altogether four years later in 1999, when, in the face of an office closure, he was denied the opportunity to transfer to another management position within the company for which he was clearly qualified, while the same position was offered to the less qualified and less experienced Dale Hill. While federal law allows private employers some leeway in encouraging and fostering the hire and advancement of qualified minorities, it does not allow them to run roughshod over the

* * *

[p.40]

833, 842 (7th Cir. 1996). ("Persons of any age are capable of practicing age discrimination.")

Defendant further argues that it is entitled to summary judgment because Pete Hagan himself testified in his deposition that he wasn't officially sure why he was terminated, and that it was only his "gut reaction" that the defendant harbored animus against him because of his race. However, the mere subjective feelings of Pete Hagan, a layman, are irrelevant. Mr. Hagan is not a lawyer. He has no grasp of the evidentiary nuances of discrimination law such as the *McDonnell Douglas* burden shifting formula. It also bears

mentioning that Hagan offered this testimony rather early on in litigation, before he had an opportunity to hear and evaluate all of the testimony and documents offered up by WEA. *Chappel v. GE Products Corp.* cited by defendant in its memorandum in support of summary judgment is not on point. In *Chappel,* the only evidence that plaintiff offered in support of his case of employment discrimination was statistical evidence that was so sketchy and unpersuasive as to constitute "mere conjecture, personal belief." In contrast to *Chappel,* Mr. Hagan adduced a substantial quantity of evidence, both direct and circumstantial, over and above his own personal belief he was discriminated against on the basis of race.

WEA next argues that Mr. Hagan's allegations of unequal treatment in 1995 are time-barred. WEA is correct to the extent that plaintiffs *federal* claims of reverse race discrimination or for that matter, age and sex discrimination, are untimely. However, these very same claims were filed as violations of Ohio's anti-discrimination statute, Chapter 4112 of the Ohio Revised Code. These allegations were timely filed.

APPENDIX L

Declaration of Dennis Schone

Exhibit N

[November 12, 2001]

Pursuant to 28 U.S.C. § 1746, I swear to the following:

1. I am currently a Vice President of Sales and Marketing, Midwest Region (formerly termed "Branch Manager") for Warner/Elektra/Atlantic Corp. ("WEA") in its Chicago branch office.

2. In approximately 1986, Mike Spence, the Cleveland Branch Manager, told me that he was considering promoting Peter Hagan. In response, I told Mike Spence that I felt that Hagan did an okay job as a Sales Representative, but that I did not feel he was management material.

3. I know Ron Hewlett. Ron Hewlett was working as the District Sales Manager in WEA's Detroit sales office when I took over responsibility for what was previously the Cleveland branch in the spring of 1995. This included responsibility for WEA's Detroit sales office. Hewlett continues to this day to be responsible for WEA's Detroit office. Hewlett is a white male and is approximately 56 years old.

4. I know Lew Garrett. Garrett is a white male, and I estimate him to be in his mid to late 40's.

5. Prior to the closing of WEA's Cleveland office in 1999, Patti Fullard was employed in the Cleveland office as a Field Sales Manager of Black Music. After Camelot closed its operations based in Canton, Ohio, the great majority of accounts serviced by Fullard were located in Detroit, Michigan. When the Cleveland office was closed in 1999, Fullard's base of operations was transferred to Detroit.

6. Fullard's move to Detroit in 1999 did not displace any other WEA employee. She continued with her job, but it was based out of Detroit, rather than Cleveland.

I declare under penalty of perjury that the foregoing is true and correct.

Executed On: 11/12/2001 /s/ _____
Dennis Schone